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In The

Supreme Court of the United States

October Term 1996

THOMAS J. BYRNES
and
RICHARD C. OTTO

Petitioners,

v.

LCI COMMUNICATIONS HOLDINGS CO..
LCI COMMUNICATIONS, INC.
LITEL COMMUNICATIONS CORPORATION
LITEL TELECOMMUNICATIONS CORPORATION

Respondents.

Petition For Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

Russell A. Kelm
Law Offices of Russell A. Kelm
37 W. Broad Street, Suite 860
Columbus, Ohio 43215
(614) 240-5900
Attorneys for Petitioners
Thomas J. Byrnes and Richard C. Otto

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QUESTIONS PRESENTED

1. When a terminated employee is not replaced, should a jury verdict for the employee based on overwhelming circumstantial evidence of age discriminatory animus by the decisionmaker be overturned by an appellate court using *McDonnell Douglas v. Green,* to restrict, rather than expand, the ways to prove age discrimination?

2. Does the Seventh Amendment permit the Ohio Supreme Court to weigh the sufficiency of evidence supporting a jury verdict in order to subjectively reach an election year goal of reversing a large jury verdict against an age discriminating employer?

PARTIES

Thomas J. Byrnes
and
Richard C. Otto

Petitioners

-vs-

LCI Communications Holdings, Co.
LCI Communications, Inc.
Litel Communications Corporation
Litel Telecommunications Corporation

Respondents

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PETITION FOR WRIT OF CERTIORARI

Thomas J. Byrnes and Richard C. Otto respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered on December 11, 1996 and the denial of a motion for reconsideration entered on January 15, 1997 in order to resolve the confusion among the lower courts which use the *McDonnell Douglas Corp. v. Green* test to restrict, rather than expand the ways to prove discrimination and to reassert the very restricted review of jury verdicts mandated by the Seventh Amendment.

OPINIONS BELOW

The opinion of the Ohio Supreme Court reversing an age discrimination jury verdict that gives rise to this petition is published at 77 Ohio St.3d 125, 672 N.E.2d 145 (1996). It is reprinted in the Appendix at page A-1. The denial of reconsideration is published at 77 Ohio St.3d 1527, 674 N.E.2d 377 (1997). It is reprinted herein at page A-42. The opinion of the Ohio Tenth District Court of Appeals affirming the verdict is unreported and is reprinted herein at page A-43. The decision and entry of the Franklin County, Ohio Court of Common Pleas overruling the post trial motions are unreported and are reprinted herein at pages A-63 and A-67. The entry of the Franklin County Ohio Court of Common Pleas on the jury verdict is unreported and is reprinted herein at page A-83

BASIS FOR JURSDICTION

The judgment of the Ohio Supreme Court was entered on December 11, 1996 and a timely motion for reconsideration was denied on January 15, 1997. This petition for writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

29 U.S.C. § 623(a)(1) provides *inter alia* as follows:

> (a) . . . It shall be unlawful for an employer . . . (1) . . . to discharge any individual . . . because of such individual's age.

Ohio Revised Code § 4112.02 provides *inter alia* as follows:

> 4112.02. It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the . . . age . . . of any person, to discharge without just cause . . . or otherwise discriminate against that person with respect to . . . employment.

The Seventh Amendment to the United States Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

With the vague language of both the federal and Ohio age discrimination statutes, the Ohio courts look to federal interpretations of discrimination laws for guidance and have expressly adopted the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973) analysis into Ohio law. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128, 131 (1981); *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 147, 451 N.E.2d 807, 808 (1983). In order to overturn a large age discrimination jury award, the Ohio Supreme Court has now convoluted the four-part *McDonnell Douglas* analysis to require that if not replaced by someone outside the protected group then age discrimination may not be proven by circumstantial evidence. The court also subjectively weighed the evidence to subvert a jury's determination of facts in violation of the Seventh Amendment.

STATEMENT OF CASE

The Ohio Supreme Court, by a split decision, reversed a $7.1 million age discrimination verdict following a trial which a dissenting Justice characterized as a case that was "well and truly tried, the parties skillfully represented, and the operative law correctly stated to the jury by the trial judge." (A-41.) The Ohio Court of Appeals had upheld the trial verdict and added prejudgment interest to it. (A-44.) The Ohio Supreme Court, with a total of 15 pages of dissenting opinions, reversed the jury verdict despite the proof of at least 12 different expressions of age-related animus by the ultimate supervisor of two officers who were discharged at ages 51 and 61. Neither was replaced before the supervisor himself was terminated. Although the size of the jury verdict may appear large, the ultimate replacement for one of the plaintiffs has received over $11 million in compensation since assuming the position and, because of that, the company stipulated to the reasonableness of the damage calculations presented by counsel at trial. Tr. 10/22 at 78.

Although one dissenting Justice characterized the majority as simply correcting an excessive jury award (A-40-A-41), the majority reversed on the basis that the fourth element of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973) analysis needed to be satisfied (replaced by a worker outside the protected group) or circumstantial evidence could not be used to prove age discrimination. (A-11 and A-12.) The Ohio Supreme Court also subjectively found that the 12 age discriminatory incidents involving the supervisor were insufficient evidence to support the verdict (A-11),

despite the trial court's overruling of directed verdict and new trial motions and the Seventh Amendment's proscription of re-examination of facts tried to a jury. The unanimous jury found by special verdicts that age was the determining factor in the decision to terminate.

The motion for reconsideration was denied.

The decision of the Ohio Supreme Court was the stage of these proceedings where the federal questions sought to be reviewed here were raised for the first time. It was the Ohio Supreme Court's restrictive misconstruction of the *McDonnell Douglas Corp. v. Green* analysis and its subjective weighing of the sufficiency of the evidence presented to the jury in contravention of the Seventh Amendment to the U.S. Constitution that created the federal questions in this case for the first time. [A-1.] Plaintiffs in the courts below set forth the correct analysis under *McDonnell Douglas* and the standards for reviewing a jury verdict. *See* Plaintiffs' Opposition to Defendants' Motion for JNOV or New Trial and Brief of Appellees in the Franklin County Court of Appeals. The Common Pleas Court used the correct analysis under *McDonnell Douglas* and correctly did not weigh the sufficiency of the evidence presented to the jury. [A-67.] The Court of Appeals also correctly applied *McDonnell Douglas* and the standard for reviewing a jury verdict. [A-43.] Therefore, it was not until the Ohio Supreme Court's decision that these federal issues were raised.

REASONS FOR ALLOWING THE WRIT

1. A Jury Verdict In An Age Discrimination Case Based On Substantial Circumstantial Evidence Of Discrimination Should Not Be Overturned Based On A Restrictive Reading Of *McDonnell Douglas Corp. v. Green.*

Rather than limiting the analysis of this Court's holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to cases where no evidence of discrimination exists, courts in Ohio and elsewhere routinely use the four-part standard of that case as a sword to defeat discrimination claims where solid traditional evidence of discrimination exists. The result is that by adopting the *McDonnell Douglas* test in Ohio in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 147, 451 N.E.2d 807, 808 (1983), and requiring Ohio courts to generally follow federal interpretations of discrimination laws, *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128, 131 (1981), circumstantial evidence can be used to send someone to the electric chair in Ohio but cannot be used in an age discrimination case if the employer is crafty enough to not immediately replace an older worker or to simply create a new position for them then eliminate the position.

This case presents a full record case in which this Court must come full circle and restate that discrimination may always be proven by traditional evidence and that *McDonnell Douglas* was intended only for cases where traditional evidence is unavailable to prove discrimination.

2. The Seventh Amendment Applies To The States Through The Due Process Clause Of The Fourteenth Amendment To The Extent That No State Appellate Court May Subjectively Weigh The Sufficiency Of Evidence To Reverse A Substantial Age Discrimination Verdict To Achieve Election Year Results Favoring A Large Employer.

The proscription of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" is applicable to the review of state court cases by this Court. *Chicago, B. and Q. Ry. Co. v. Chicago*, 166 U.S. 226, 242-243 (1896); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964). The only common law methods of review are the trial court's rulings on motions for a directed verdict or for a new trial. *Parsons v. Bedford*, 28 U.S. 433, 448 (1830). The rules of the common law of England were what was meant for methods of review, *Capital Traction Co. v. Hof*, 174 U.S. 7 (1899) and suits at common law means legal as opposed to equitable proceedings. *Parsons v. Bedford*, 28 U.S. 443, 446 (1830).

The Ohio Supreme Court here reweighed the sufficiency of the trial evidence in a subjective manner giving no benefit to the jury's construction of it. Such a review is prohibited by the Seventh Amendment. *Lumberman's Mutual Cas. Co. v. Elbert*, 348 U.S. 48, 52 n.5 (1954); *Justices v. Murray*, 76 U.S. 278 (1870).

Courts may not redetermine facts found by a jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1967); *Parsons v. Bedford*, 28 U.S. 433, 448 (1830). A verdict cannot be overturned if there was any competent and substantial evidence in the record which fairly tends to support the verdict. *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165, 1167 (5th Cir. 1982); *Blount Bros. Corp. v. Reliance Ins. Co.*, 370 F.2d 733, 739 (5th Cir. 1967).

An appellate court cannot reweigh or set aside a verdict because it could have drawn different inferences or conclusions from the evidence or because other results might be more reasonable. *Gallich v. Baltimore & Ohio Ry Co.*, 372 U.S. 108, 115 (1963); *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U.S. 107, 109 (1959). Appellate review should only determine if there was any competent and substantial evidence in the record which fairly tends to support the verdict. *Mortensen v. United States*, 322 U.S. 369, 374 (1944). A verdict is not to be overturned because contradictory evidence was presented if there is an evidentiary basis for the verdict. *Bosham v. Pennsylvania Ry. Co.*, 372 U.S. 699, 700-701 (1963). An award cannot be set aside as excessive without a detailed appraisal of the damage evidence which concludes that the jury award is so high that it would be a denial of justice to let it stand. *Grumenthal v. Long Island Ry. Co.*, 393 U.S. 156, 159 (1968).

In this case, the evidence showed that the Chairman of LCI did the following from 1984 to 1989:

1. Terminated an older secretary so he could hire a younger one (Tr. 10/20 at 17);

.2. Told a sales manager that the company:
   a. needed to "bring in young, aggressive staff managers and change out the old folks" (Tr. 10/19 at 17);
   b. that "he was looking for young risk-takers" (Tr. 10/19 at 78);
   c. that a competitor was successful because it "had a very youthful marketing department" (Tr. 10/19 at 79);
   d. some of the older folks [at LCI] could no longer contribute and the way to go was to "find hard-working, young, feisty marketing types" (Tr. 10/19 at 82-83);
   e. that one advertising manager was "essentially over the hill" and "too old to grasp the concepts that he was looking for" (Tr. 10/19 at 83);
   f. that another employee was "too old for this business" (Tr. 10/19 at 88);
3. Told a sales and marketing executive of a plan to "bring on board very young, inexperienced college grad types" since "those old farts you hired aren't going to be around forever" (Tr. 10/19 at 22, 24);
4. Through a vice president, who never did anything without the Chairman's approval, he
   a. wanted to set up an associate program to hire younger people the company "could get for obviously much less money than an older, experienced person" (Tr. 10/19 at 30);
   b. didn't "want old marathoners in my sales organization," only "young sprinters" (Tr. 10/19 at 41);

c. referred to an employee as "an old bulldog" when describing a need to replace him (Tr. 10/19 at 83);

5. Insinuated to one of the plaintiffs that the other one (Otto) had Alzheimer's disease, which he did not. Even LCI admitted that this comment was "obviously" age-related. (Tr. 10/22 at 88.)

When plaintiffs were terminated in late 1990 and early 1991, the company revenues and profits had increased over 30% each year for three years while the industry average was 8%. At a Board meeting where a projected revenue shortfall from budget was projected, the Board also approved a 10% salary increase for Byrnes. Byrnes' boss received a $100,000 bonus for each of the last two quarters before Byrnes was supposedly terminated because of the company's economic performance. In their last year as employees, the number of customers doubled while the climate for its business was faltering. The jury disbelieved the company's explanations for the discharges and found in a special verdict that the determining factor in the terminations was age.

As the extensive dissenting opinion of Justice Alice Robie Resnick in the Ohio Supreme Court explains, the approach of the majority is contrary to the holdings of this Court on the plaintiffs' burden in this type of case. [A-24 and A-36.] The overwhelming evidence of discrimination was simply ignored by the majority below and the tight strictures of the Seventh Amendment must be applied to a review of this verdict.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Russell A. Kelm
Law Offices of Russell A.. Kelm
Suite 860
37 W. Broad Street
Columbus, Ohio 43215
(614) 240-5900
Attorneys for Petitioners
Thomas J. Byrnes and Richard C. Otto

April 15, 1997

BYRNES ET AL., APPELLEES, *v.* LCI COMMUNICATION HOLDINGS COMPANY ET AL., APPELLANTS.

[Cite as *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125.]

Age discrimination—Employment discharge action—Inference that employer was motivated by discriminatory animus to act against employee not possible absent casual connection between employer's discriminatory statements and employee—Discrimination against other employees, standing alone, is insufficient to prove employer also discriminated against plaintiff-employee on basis of age—Establishing prima facie case of age discrimination under R.C. 4112.02 or 4112.14.

(No. 95-1222—Submitted May 22, 1996—Decided December 11, 1996.)

APPEAL from the Court of Appeals for Franklin County,
Nos. 94APE09-1372 and 94APE09-1396.

In 1988, Lawrence McLernon, then chief executive officer of defendant-appellant Litel Communications, Inc. ("LCI"; other defendants are affiliated corporations), recruited plaintiff-appellee Thomas J. Byrnes, age forty-eight, to become LCI's president and chief operating officer. In his capacity as president, Byrnes was

responsible for the inside operations of LCI and had direct supervision over sales, operations and computer projects.

McLernon also recruited plaintiff-appellee Richard Otto, age fifty-six. Otto began as a consultant for the company in 1985. In 1987, Otto became a full-time employee and was named vice president. He worked on special projects and reported to McLernon. He was placed in charge of an area designated as "standards and analysis," and he began reporting directly to Byrnes.

In 1990, LCI acquired Charter Network Company ("Charter"), and Otto was responsible for integrating the acquisition. There were problems with the acquisition, and Byrnes received complaints about Otto's performance. As a result, Byrnes gave Otto an unsatisfactory rating for the third quarter of 1990, and he was not given a performance bonus for that period. After the Charter acquisition was completed, Otto was relieved of further responsibility for LCI's acquisitions. Eventually, Byrnes eliminated Otto's position and distributed his duties among other vice presidents. Byrnes told Otto that LCI no longer needed his services. Byrnes testified that his decision to terminate Otto had nothing to do with Otto's age and that he tried to find another position for Otto during the latter half of 1990 but was unable to locate an available position. LCI announced Otto's departure as retirement.

Byrnes also received an unsatisfactory rating for the third quarter of 1990 and did not receive a performance bonus. He failed to meet all his performance objectives for 1990, and LCI failed to meet its budgeted revenues

for the year. In early 1991, McLernon terminated Byrnes, age fifty-one. McLernon, who is older than Byrnes, assumed Byrnes's duties.

Otto received severance pay of one year's salary. Byrnes was given a severance package in accordance with the terms of his employment agreement. He returned home to his family in Ireland, where he eventually accepted a position as a university professor at about ten percent of his total 1990 compensation from LCI.

In 1991, Byrnes and Otto filed this action against LCI alleging that they had been discharged on the basis of their age in violation of R.C. 4112.02. At trial, several former LCI employees testified about McLernon's attitude toward older employees. Priscilla Frasher was hired in 1984 as executive secretary for McLernon. Frasher, who was over age fifty when hired, was discharged shortly before her three-month probationary period ended. She testified that she was told by LCI's chief financial officer, Larry Wolfe, that she had been terminated so that the company could hire a younger person at a lower salary.

Former employee Daniel Lopez testified that during his initial employment interviews in 1989, McLernon said he was displeased with LCI's marketing organization and the only way to turn it around "was to bring in young, aggressive staff managers and change out the old folks." McLernon stated that he "was looking for young risk-takers," and he commented on the youthful marketing departments of LCI's competitors, AT&T and MCI. On another occasion after Lopez had

been hired, McLernon favorably commented on Lopez's proposed reorganization of the marketing department because "some of the older folks there could no longer contribute" to the company. Lopez testified that later McLernon referred to an advertising manager as being "essentially over the hill" and "too old to grasp the concepts that he was looking for." McLernon also referred to another terminated employee as being "too old and tired" for this business.

Ed Florek, another former LCI executive, testified about a conversation in 1985 with McLernon about wanting to create a sales associate program to hire very young, inexperienced associates to be teamed with older, more experienced persons to mentor them. McLernon's reasoning was that "[t]hose old farts you hired aren't going to be around forever." Another LCI executive, John Janis, reportedly stated to Florek, "I don't want old marathoners in my sales organization. I want young sprinters."

The only testimony to have possibly created an inference of age discrimination toward *these* plaintiffs came from Byrnes, who testified that, during the problematic period of the Charter acquisition, he met with McLernon, who questioned whether Otto might be suffering from Alzheimer's disease. Thereafter, McLernon repeatedly asked Byrnes what he intended to do about Otto's future with LCI and began nagging him to terminate Otto.

At the close of the plaintiffs' case, the trial judge denied LCI's motions for directed verdicts despite his comment that "98 percent of the evidence in the record

doesn't have anything to do with age discrimination." A jury rendered verdicts in favor of Byrnes and Otto and awarded them damages in the form of back pay, front pay, and punitive damages, totaling approximately $7.1 million. LCI filed post-trial motions seeking judgment notwithstanding the verdict, and a new trial or remittitur on the basis that the plaintiffs had not produced sufficient evidence that age had been considered by LCI in terminating Otto or Byrnes. The court denied the motions and also awarded plaintiffs-appellees additional sums for stock rights each would have received but for their terminations, and for attorney fees.

The court of appeals affirmed the trial court in all respects except for its denial of prejudgment interest. The court concluded that the evidence demonstrated a pattern whereby LCI hired older, experienced management employees for their knowledge and experience, then discarded them once their knowledge and experience had been assimilated into the company, a theory which the court of appeals analogized to squeezing the contents from a tube of toothpaste, then throwing the tube away, *i.e.*, the "toothpaste tube" theory of liability. The appellate court then remanded the matter with instructions to grant prejudgment interest.

The cause is now before this court upon the allowance of a discretionary appeal.

Russell A. Kelm, for appellees.

Jones, Day, Reavis & Pogue, Patrick F. McCartan, Glen D. Nager and *Steven T. Catlett*, for appellants.

Stewart Jaffy & Associates Co., L.P.A., Stewart R. Jaffy and *Marc J. Jaffy*, urging affirmance for *amicus curiae*, Ohio AFL-CIO.

Murray & Murray Co., L.P.A., Dennis E. Murray, Jr. and *Patrick G. Warner*, urging affirmance for *amicus curiae*, Ohio Academy of Trial Lawyers.

Spater, Gittes, Schulte & Kolman, Frederick M. Gittes, Kathaleen B. Schulte and *Louis A. Jacobs*, urging affirmance for *amici curiae*, Ohio Chapter of the National Organization for Women, 9To5 National Association of Working Women, Police Officers for Equal Rights, Stonewall Union, Ohio Now Education and Legal Fund, National Association for the Advancement of Colored People, Columbus Chapter, the Ohio Civil Rights Coalition, and the Ohio Employment Lawyers Association.

Betty D. Montgomery, Attorney General, and *Jeffrey S. Sutton*, State Solicitor, urging reversal on the issue of punitive damages for *amicus curiae*, Ohio Attorney General.

Jonathan A. Allison, urging reversal for *amicus curiae*, the Ohio Chamber of Commerce.

STRATTON, J. The issues presented for review involve the sufficiency of evidence that LCI terminated plaintiffs-appellees on the basis of their age in violation of R.C. 4112.02(N), and the propriety of the damages awarded by the jury. Plaintiffs-appellees contend that evidence of discriminatory remarks demonstrated that a pervasive, discriminatory animus existed at LCI, in particular with Lawrence McLernon, and was sufficient to support a finding of age discrimination. Because we determine that the evidence was not sufficient to support the verdict, we reverse the court of appeals.

R.C. 4112.02 makes it unlawful for an employer to discharge without just cause or otherwise discriminate against a person with respect to any matter related to employment on the basis of age. R.C. 4112.14 (formerly R.C. 4101.17) specifically prohibits an employer from discriminating against a job applicant or discharging without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job.

In *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 664 N.E.2d 1272, this court clarified the methods for establishing a prima facie case of age discrimination under R.C. 4112.14. The methods are the same for R.C. 4112.02, at issue here. Discriminatory intent may be established indirectly by the four-part analysis set forth in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807, adopted from the standards established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. The *Barker* analysis requires that the plaintiff-employee demonstrate "(1) that he was a member of the

statutorily-protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class." *Id.*, paragraph one of syllabus.

Discriminatory intent may also be established by direct evidence of age discrimination, which is evidence other than the four-part demonstration of *Barker*. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 575 N.E.2d 439. A plaintiff may establish a prima facie case by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent. *Mauzy*, 75 Ohio St.3d 578, 664 N.E.2d 1272, paragraph one of the syllabus.

The evidence at trial consisted of remarks by McLernon and other LCI executives as proof of LCI's discriminatory attitude and continuing animus toward older workers. However, none of the remarks, except for the single reference to Alzheimer's disease, had any connection to either of these plaintiffs. There was no link or nexus between the remarks and plaintiffs' discharges that could logically support the inference that the discharges were the result of discriminatory intent. The remarks were distant in time and in fact to plaintiffs' terminations. Lopez testified as to comments made in 1989, more than one year before these plaintiffs were terminated. Frasher's and Florek's testimony related to comments even more remote, dating back to 1985, years before either Byrnes or Otto became employees of LCI.

The remarks did not relate to Byrnes and Otto or the decisions to terminate their employment. They related to

other persons and positions within the company, specifically an executive secretary and sales and marketing personnel. Otto was a vice president who worked in operations, and Byrnes was a high level executive.

The isolated statement attributed to McLernon about Alzheimer's disease, a disease which generally afflicts the elderly, refers only to Otto and may best be characterized as inappropriate and insensitive. This single comment by McLernon is insufficient to form the basis of Otto's claim for age discrimination, considering that Byrnes made the final decision to terminate Otto, that Byrnes testified that his decision was not related to Otto's age, and that there is no evidence to the contrary.

Although the record is replete with testimony of LCI's business woes and tales from former LCI employees, glaringly absent from the record below is evidence which points to age discrimination against *these* plaintiffs, an observation made by the trial judge when he commented at the close of all evidence that "98 percent of the evidence in the record doesn't have anything to do with age discrimination." In fact, there is ample testimony of the failure of performance by both Otto and Byrnes.

Even plaintiffs-appellees concede that they do not meet the four-part *Barker* analysis. Byrnes was the executive who terminated Otto, who was not replaced. Byrnes himself was then terminated and replaced by McLernon, who was older. Therefore, the fourth prong of the *Barker* analysis was not met, as neither Byrnes nor

Otto was replaced by a person outside the statutorily protected class.

Instead, plaintiffs-appellees rely upon evidence in the form of statements by McLernon and other LCI executives over a period of many years to prove discriminatory intent against older workers in general. However, this theory, called the "toothpaste tube" theory by the court of appeals, has no basis in law. The ultimate inquiry in an age discrimination case is whether a plaintiff-employee was discharged on account of age. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 505, 575 N.E.2d 439, 442. Age-related comments referred directly to the worker may support an inference of age discrimination. However, comments which are isolated, ambiguous or abstract, or made in reference to totally unrelated employee categories cannot support a finding of age discrimination against employees in a wholly different classification. See *Phelps v. Yale Security, Inc.* (C.A.6, 1993), 986 F.2d 1020, 1025. There must be a link or nexus between the discriminatory statement or conduct and the prohibited act of discrimination to establish a violation of the statute. In *Kohmescher*, there was a memorandum which recommended that the plaintiff be selected for Kroger's reduction in workforce because he was "eligible for [the] retirement window." Here, at best, plaintiffs have an isolated comment by McLernon suggesting one of the plaintiffs, Otto, might have Alzheimer's disease. Perhaps McLernon was truly concerned about Otto's status; more likely, he made a joke in poor taste. However insensitive and intemperate these remarks were, they were not tied in time or fact to either Byrnes or Otto's terminations. Consequently, they are simply

insufficient to support the jury's findings that these plaintiffs were discharged on account of their age.

Absent some causal connection or link between an employer's discriminatory statements or conduct and a plaintiff-employee, there is no permissible inference that the employer was motivated by discriminatory animus to act against the plaintiff-employee. The mere fact that an employer may have discriminated against other employees, standing alone, is insufficient. The issue is whether *this* employee was discharged because of his age. The evidence here clearly does not support such a causal link or nexus.

Therefore, we hold that, in a cause of action for age discrimination under R.C. 4112.02 or 4112.14, when relying upon the direct evidence standard, which is evidence other than the four-part test of *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807, an employee must prove a causal link or nexus between evidence of a discriminatory statement or conduct and the prohibited act of discrimination to establish a violation. The judgment of the court of appeals is reversed. Based upon our finding of insufficient evidence to sustain the verdicts for plaintiffs-appellees, we need not reach the issue of the propriety of damages.

Judgment reversed.

MOYER, C.J., and COOK, J., concur.

DOUGLAS and F.E. SWEENEY, JJ., concur in the judgment.

RESNICK and PFEIFER, JJ., dissent separately.

DOUGLAS, J., concurring. I concur in the judgment. In so doing, I continue to subscribe to our holding in *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 664 N.E.2d 1272.

My concurrence herein is based specifically on the fact that the fourth prong of the test established in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807, is absent in this case, to wit, that plaintiffs-appellees were not replaced by a person or persons not belonging to the protected class. Plaintiffs-appellees were, in fact, not replaced at all.

In concurring, I am not unmindful of the "direct evidence" standard as so well set forth in the dissent of Justice Resnick. I believe the standard, where it can be shown to exist, still lives.

F.E. SWEENEY, J., concurs in the foregoing concurring opinion.

ALICE ROBIE RESNICK, J., dissenting. There is a majority in this case, but no majority *opinion*. The majority consists of five justices who conclude that the decision of the court of appeals should be reversed. The majority, however, is fractionalized and represented by two separate opinions, neither of which has garnered the four votes necessary to establish binding legal precedent as to what the proof requirements are or should be in an action for age discrimination brought under R.C. 4112.02 or 4112.14. Under normal circumstances, I

would be apt to conclude that the substance of such nonmajority opinions is innocuous and regard any direct response thereto as ostentatious. However, I deem it necessary in this case to fully and directly respond to the lead and concurring opinions, despite the fact that neither enjoys majority support. This is because both opinions are ultimately of the same mind regarding the restrictions and limitations to be placed upon the use of circumstantial evidence in an age discrimination case in direct contravention of *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 664 N.E.2d 1272. Thus, the lead and concurring opinions, albeit separate and without the force of law at present, lie in wait for the next opportunity to join forces and ambush the holding of *Mauzy*.

The lead opinion derogates *Mauzy* by framing the ultimate issue of age discrimination in terms of a prima facie case and employing causative phraseology to mask what is essentially a direct evidence requirement. When the lead opinion is stripped of its veneer of causative language, all that remains is the singular holding that the plaintiff must either satisfy the four-element indirect test for establishing a prima facie case set forth in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807, at the syllabus, or produce direct evidence of discrimination in the hornbook sense, *i.e.*, evidence that directly proves discrimination without an inference. In the final analysis, these three justices favor a formula under which direct and circumstantial evidence is dichotomized, and which would provide that the only way a plaintiff could prove age discrimination by circumstantial evidence is to satisfy each of the four

discrete elements specified in the *Barker* prima facie test.

The concurring opinion "is based specifically on the fact that the fourth prong of the test established in *Barker* * * * is absent in this case, to wit, that plaintiffs-appellees were not replaced by a person or persons not belonging to the protected class." Thus, the lead and concurring opinions would both hold that *Barker's* nonstatutory elements must be proved in order to make out a case for age discrimination, despite the existence of other evidence from which a jury may infer age discrimination. Since this is precisely and unequivocally what was rejected in *Mauzy*, and for all the foregoing reasons, I find it imperative to write in defense of *Mauzy*.

The present action was fully tried on the merits in the trial court. To now frame the issue in terms of whether plaintiffs-appellees, Thomas J. Byrnes and Richard Otto, made out a prima facie case "unnecessarily evade[s] the ultimate question of discrimination *vel non*." *United States Postal Serv. Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 714, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403, 409. The prima facie case is but the first of three stages dealing with the process of allocating the burdens and order of presentation of proof in an age discrimination case. *Barker, supra; Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 575 N.E.2d 439; *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677-678. Once the paradigm runs its course, each burden thereunder "merges with the ultimate burden of persuading the [jury] that [plaintiffs have been] the victim[s] of intentional discrimination." *Texas Dept. of*

Community Affairs v. Burdine (1981), 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217. At this point, it is no longer relevant how or even whether plaintiffs succeeded initially in establishing a prima facie case. *Aikens, supra*, 460 U.S. at 715, 103 S.Ct. at 1481-1482, 75 L.Ed.2d at 410.

The only relevant question at this point is whether the defendants intentionally discriminated against the plaintiffs. Since the jury in the case *sub judice* has answered this question in the affirmative, the issue presented to this court is whether plaintiffs produced sufficient evidence to sustain the jury's finding. This issue should be decided no differently from "disputed questions of fact in other civil litigation." *Aikens, supra*, 460 U.S. at 715-716, 103 S.Ct. at 1482, 75 L.Ed.2d at 410. "[T]rial courts or reviewing courts should [not] treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' in deciding this ultimate question." (Citation omitted.) *Id.*, 460 U.S. at 716, 103 S.Ct. at 1482, 75 L.Ed.2d at 411. Thus, it is clearly erroneous to now "focus[ ] on the question of prima facie case rather than directly on the question of discrimination." *Id.*, 460 U.S. at 717, 103 S.Ct. at 1483, 75 L.Ed.2d at 411.

On the state of the record, the court should have proceeded directly to the disputed question of whether the plaintiffs presented sufficient evidence to support the jury's finding that Byrnes and Otto were the victims of age discrimination, just as we do when deciding other

ultimate questions of fact. There is no reason to allow this case to become mired in a discussion of the elements or alternative methods of proving a prima facie case.

Also, in evaluating the sufficiency of plaintiffs' evidence, it is essential to understand that in proving discrimination the plaintiff is not required to produce any certain kind of evidence and, in particular, may prove discrimination by circumstantial evidence. The plaintiff "is not limited to presenting evidence of a certain type." *Patterson v. McLean Credit Union* (1989), 491 U.S. 164, 187, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132, 157. The high court has clearly and specifically explained.

"As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *[International Brotherhood of] Teamsters v. United States*, 431 U.S. 324, 358, n. 44 [97 S.Ct. 1843, 1866, 52 L.Ed.2d 396, 429] (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination.")." *Aikens, supra*, 460 U.S. at 714, 103 S.Ct. at 1481, 75 L.Ed.2d at 409, fn. 3.

Thus, it would also be erroneous to require plaintiffs "to submit direct evidence of discriminatory intent" in order to prevail. *Id.*, 460 U.S. at 717, 103 S.Ct. at 1483, 75 L.Ed.2d at 411.

A proper analysis, therefore, should reflect that the various ageist remarks by Lawrence McLernon

constitute circumstantial evidence (in that they require an inference from the statements proved to the conclusion intended) that a discriminatory motive played a part in the challenged employment decisions. This kind of evidence may support a finding of discrimination irrespective of the *McDonnell Douglas* formula for establishing a prima facie case. *Id.*, 460 U.S. at 713-714, 103 S.Ct. at 1481, 75 L.Ed.2d at 409, fn. 2 and 3. The only question, if indeed there is one, is whether McLernon's statements were vague, ambiguous or isolated. See *Cooley v. Carmike Cinemas, Inc.* (C.A.6, 1994), 25 F.3d 1325, 1331; *Phelps v. Yale Security, Inc.* (C.A.6, 1993), 986 F.2d 1020, 1025. Certainly, they were not isolated. They were repeated, ongoing for at least five years, and made by a decisionmaker who, the evidence shows, played a part in both of the terminations at issue. Nor is there anything vague or ambiguous about statements indicative of a desire "to bring in young, aggressive staff managers and change out the old folks," or of a belief that "some of the older folks there could no longer contribute" to the company, or that a particular employee was "too old to grasp the concepts that he was looking for" or "too old and tired" for the business, or the statement that "I don't want old marathoners in my sales organization. I want young sprinters," to mention a few.

As the court of appeals aptly observed, these comments reflect "inaccurate notions that middle age equated with lack of energy, loss of memory and deficits in aggressiveness." Such statements, therefore, are indicative of the very type of age-stereotyping that the General Assembly under R.C. 4112.02 and 4112.14 prohibited employers from acting upon. They also

reflect an intent to bring such inaccurate notions to bear on employment decisions. McLernon's comments are not expressions of political belief; they are an indication to the world of how he intends to act. In particular, they express a desire to clear out the older employees. The jury should be permitted to draw an inference from this evidence that McLernon's ongoing and deep-rooted bias against older workers had influenced the decisional process at issue, especially since there was additional evidence that LCI had discriminated against other employees because of age. See *Cooley, supra*, 25 F.3d at 1331-1332; *Estes v. Dick Smith Ford, Inc.* (C.A.8, 1988), 856 F.2d 1097, 1102-1103; *Hunter v. Allis-Chalmers Corp.* (C.A.7, 1986), 797 F.2d 1417, 1423.

Thus, if we treat the issue of discrimination no differently from ultimate questions of fact in other civil litigation, or for that matter in criminal litigation, see *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, McLernon's comments constitute circumstantial evidence of age discrimination sufficient to support the jury's verdict in this case. This conclusion is inescapable unless some way can be found to artificially limit the plaintiffs to presenting evidence of a certain type and, in particular, to require the plaintiffs to produce direct evidence of discrimination in order to prevail. This is precisely what the lead opinion seeks to accomplish today; and, in so doing, it runs headlong into *Mauzy*.

The lead opinion begins by revisiting the requirements for and methods of establishing a prima facie case of age discrimination. It observes, on the one hand, that "[d]iscriminatory intent may be established

indirectly by the four-part analysis set forth in *Barker [supra]*, adopted from the standards established in *McDonnell Douglas Corp. [supra]*." On the other hand, it continues "[d]iscriminatory intent may also be established by direct evidence of age discrimination, which is evidence other than the four-part demonstration of *Barker*." Having thus dichotomized two opposing methods of establishing a prima facie case, the lead opinion concludes that "the fourth prong of the *Barker* analysis was not met, as neither Byrnes nor Otto was replaced by a person outside the statutorily protected class." Thus, plaintiffs must rely "upon the direct evidence standard" for establishing a prima facie case.

In defining the "direct evidence standard," the lead opinion correctly cites *Mauzy* for the proposition that "[a] plaintiff may establish a prima facie case by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." However, it then goes on to establish a legal standard of causation which is applicable only "when relying upon the direct evidence standard." Under this standard, a finding of discrimination will be permitted only when the employer's actions or discriminatory statements are aimed at the plaintiff and directed to the very decisional process at issue. The lead opinion will not permit the jury to infer that an illegitimate criterion entered into the decisional process where the plaintiff produces evidence that the very decisionmaker who actively or tacitly participated in the personnel decision at issue made repeated statements reflective of discriminatory animus toward a protected group of which plaintiff is a member. Nor would it allow the jury to draw such an inference

from discriminatory comments made about the desirability or work abilities of minority "workers in general," even when those comments are linked to the actual termination of other minority workers, or even when they reflect an intent to act in accordance therewith.

Thus, the lead opinion seeks to establish a formula under which the plaintiff must either satisfy the discrete elements specified in *Barker* or proceed under the "direct evidence standard." It then uses causative language to define the "direct evidence standard" in such a way as to preclude it from being satisfied by circumstantial evidence. Indeed, it would take a tremendous amount of naiveté to accept that the requirement that a statement must directly link a decisionmaker's discriminatory animus to the plaintiff and the decision to terminate the plaintiff's employment is not a requirement of "direct evidence" in the hornbook sense, that is, in contrast to circumstantial evidence. Simply, under this formula, the plaintiff must produce hornbook direct evidence of discrimination (as opposed to circumstantial evidence) in order to avoid application of *Barker's* four-element prima facie test. As a result, under the formula invoked by the lead opinion, the *Barker* prima facie test is the only way that a plaintiff can prove a case of age discrimination by circumstantial evidence.

This formula, however, is precisely the one rejected in *Mauzy* dressed up in causative attire. In *Mauzy*, the court of appeals created the exact same formula that the lead opinion creates today. As we explained, the court of appeals "agreed with Mauzy that 'the four elements [to establish a prima facie case of age discrimination] set

forth in the syllabus of *Kohmescher* * * * need not be proven where direct evidence of age discrimination is presented.' The court found, however, that Mauzy failed to present such direct evidence of age discrimination. In so finding, the court relied on the definition of 'direct evidence' as set forth in Black's Law Dictionary (5 Ed.1979) 414: 'Evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.' The court of appeals then reasoned that '[a]s a result, appellants were required to present a prima facie case of discrimination by proving the four elements set forth in the syllabus of *Kohmescher*.'" *Mauzy, supra*, 75 Ohio St.3d at 581, 664 N.E.2d at 1275.

In this way, the court of appeals in *Mauzy* interpreted the words "direct evidence" as used in *Kohmescher* in the same way that today's lead opinion has interpreted the "direct evidence standard" which it ascribes to *Mauzy, i.e.*, as "amount[ing] to a rendition of a dichotomy between 'direct' and 'circumstantial' evidence." *Mauzy*, 75 Ohio St.3d at 583, 664 N.E.2d at 1277. Additionally, the employer in *Mauzy* argued, as the lead opinion would hold today, that "a plaintiff attempting to produce direct evidence to avoid application of the *McDonnell Douglas* test cannot rely upon the presentation of merely circumstantial evidence." *Id.*, 75 Ohio St.3d at 584, 664 N.E.2d at 1278. Similarly, the dissenting judge in the court of appeals in the case *sub judice* (whose opinion was rendered prior to our decision in *Mauzy*) argued as did the employer in *Mauzy*:

"While here, there were many instances of insensitive comments with respect to other personnel, there was no direct evidence that age discrimination took place, particularly as it related to appellees. In each of the comments cited by the majority, we can only *infer* that age was the cause for termination. Unlike *Kohmescher*, there is no direct evidence in the instances cited here and, certainly, no direct evidence with respect to appellees.

"* * * Clearly, the statements are not direct evidence of age discrimination, as it relates to appellees herein. Appellees should not be able to get around the evidentiary requirements of *Barker* based on inferences created from statements and any attitudes associated with them." (Close, J., dissenting.)

Our primary and precise focus in *Mauzy* was to reject these notions. We very carefully and clearly explained that "*McDonnell Douglas* is one method, an indirect method involving the process of elimination, whereby the plaintiff may create an inference that an employment decision was more likely than not based on illegal discriminatory criteria. The process of elimination, however, is not the only method by which such an inference may be created." *Id.*, 75 Ohio St.3d at 584, 664 N.E.2d at 1277. Instead, "the four-element *McDonnell Douglas* prima facie test comes into play '"*absent direct, circumstantial, or statistical evidence of discrimination.*"'" (Emphasis *sic.*) *Id.*, 75 Ohio St.3d at 584, 664 N.E.2d at 1278. Thus, "[t]he caliber of evidence as 'direct' * * * is [not] the sole alternative method [to the *Barker/McDonnell Douglas* test] by

which to create an inference of discrimination." *Id.*, 75 Ohio St.3d at 586, 664 N.E.2d at 1279.

Accordingly, we held that "[t]he phrase 'Absent direct evidence of age discrimination,' as used in *Kohmescher* * * *, refers to a method of proof, not a type of evidence. It means that a plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." *Mauzy*, *supra*, at paragraph one of the syllabus.

Mauzy made clear that there was no limitation placed upon the type of evidence that a plaintiff may produce instead of the *Barker* four-element prima facie test. Only when the plaintiff lacks direct, circumstantial or statistical evidence of discrimination is he or she required to prove the discrete elements specified in *Barker*. Simply stated, the *Barker* test is not the only way for a plaintiff to raise an inference that an employment decision was based on illegal discriminatory criteria. The plaintiff is entitled to prove his or her case by circumstantial evidence of age discrimination outside the confines of *Barker's* four-element prima facie test.

Similarly, the concurring opinion "is based specifically on the fact that the fourth prong of the test established in *Barker* * * * is absent in this case, to wit, that plaintiffs-appellees were not replaced by a person or persons not belonging to the protected class." However, even if at this late stage of the proceedings we allow the inquiry to become entangled in a discussion of the prima

facie case, we cannot require Byrnes and Otto to prove that they were replaced by a person not belonging to the protected class without directly contravening *Mauzy*. The replacement requirement is not a statutory requirement. Neither R.C. 4112.02 nor 4112.14 imposes any such requirement. Instead, it is imposed as part of a judicially created formulation which "allow[s] the plaintiff to raise an inference of discriminatory intent indirectly [by] serv[ing] to eliminate [one of] the most common nondiscriminatory reasons for the employer's action." *Mauzy, supra*, 75 Ohio St.3d at 583, 664 N.E.2d at 1277. The indelible core principle of *Mauzy* is that where the plaintiff creates an inference "directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent," the *McDonnell Douglas/Barker* prima facie test simply does not come into play. This means that where the plaintiff presents circumstantial evidence of age discrimination other than the *Barker* formulation, as Byrnes and Otto did in this case, none of *Barker's* nonstatutory elements apply, particularly the requirement that plaintiff prove that he or she was replaced by, or that his or her discharge permitted the retention of, a person not belonging to the protected class. "'As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.'" *Mauzy, supra*, 75 Ohio St.3d at 584, 664 N.E.2d at 1278, quoting *Aikens, supra*, 460 U.S. at 714, 103 S.Ct. at 1481, 75 L.Ed.2d at 409, fn. 3.

The approach advanced in the lead and concurring opinions, therefore, stands in diametric contradiction to our holding in *Mauzy*, as well as to the holdings of the United States Supreme Court, regarding the plaintiff's

ultimate evidentiary burden in cases of disparate treatment of individuals. In addition, the lead opinion incorporates a number of erroneous assumptions about what kinds of discriminatory comments made by an employer will suffice to support a finding of discrimination.

First, it assumes that discriminatory comments about "older workers in general" are insufficient to support an inference of age discrimination. The lead opinion states that "this theory, called the 'toothpaste tube' theory by the court of appeals, has no basis in law." Instead, it reasons, "[a]ge-related comments referring directly to the worker may support an inference of age discrimination."

Leaving aside for the moment the lead opinion's characterization of the court of appeals' reference to oral hygiene,[1] comments about "older workers in general" may indeed support an inference of age discrimination.

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[1] The reference to the court of appeals' adoption of a "'toothpaste tube' theory" is misleading and derogatory. By making what is essentially an analogy appear as a colloquial term for a rule of law, the lead opinion is able to slight the court of appeals for establishing a legal rule that purportedly has no basis in law. But, see, *Cooley, supra.* The truth is that the court of appeals used the term simply to illustrate the facts of the case as described by the plaintiffs-appellees. The court explained:

"On this appeal, Mr. Otto and Mr. Byrnes assert that they should be permitted to recover if they demonstrate the existence of a pattern of hiring and firing by LCI in which LCI hired older, experienced management employees; acquired the benefit of their knowledge and experience; and then discarded the employees once their knowledge and experience had been assimilated into the company. *The analogy used is to buying a full tube of toothpaste, squeezing the contents from the tube, then throwing the tube away once the tube had served its purpose.*" (Emphasis added.)

Comments about entire groups or classes in society, particularly when directed at the desirability of employing them and their ability to work, are the very stuff of individual disparate-treatment cases. In fact, even courts which require direct evidence of discrimination to shift the burden of persuasion in a *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, "mixed motives" type of case do not preclude expressions of discriminatory animus from serving this function merely because they are general in nature. Thus, even "[d]irect evidence of discrimination usually entails a general comment about a minority group in society. The courts infer from such a remark that the defendant had discriminatory animus toward the particular plaintiff in the particular job." *Milligan-Jensen v. Michigan Technological Univ.* (D.C.Mich.1991), 767 F.Supp. 1403, 1413, reversed on other grounds (C.A.6, 1992), 975 F.2d 302. See, also, *Talley v. Bravo Pitino Restaurant, Ltd.* (C.A.6, 1995), 61 F.3d 1241, 1249; *Stacks v. Southwestern Bell Yellow Pages, Inc.* (C.A.8, 1993), 996 F.2d 200, at 202-203; *Linn v. Andover Newton Theological School, Inc.* (C.A.1, 1989), 874 F.2d 1, 3-4; *Sennello v. Res. Life Ins. Co.* (C.A.11, 1989), 872 F.2d 393, 394-395; *Miles v. M.N.C. Corp.* (C.A.11, 1985), 750 F.2d 867, 874, 876. Even a cursory review of these cases reveals a myriad of comments which clearly support an inference of discrimination, despite the fact that they do not refer directly to the plaintiff-worker.

Second, the lead opinion concludes that comments which are "made in reference to totally unrelated employee categories cannot support a finding of age discrimination against employees in a wholly different

classification." In this regard, it explains that "[t]he remarks did not relate to Byrnes or Otto or the decisions to terminate their employment. They related to other persons and positions within the company, specifically an executive secretary and sales and marketing personnel."

The underlying assumption here is that discriminatory statements must directly relate to the challenged employment decision in order to support a finding of discrimination. Thus, in the absence of a direct relationship between the employer's ageist remarks and the decisional process at issue, an inference of discrimination is impermissible. In *Radabaugh v. Zip Feed Mills, Inc.* (C.A.8, 1993), 997 F.2d 444, 449, the court explained:

"We do not believe corporate planning documents that set forth a company's overall direction and that demonstrate that a decisionmaker considers youth a positive factor (and, by inference, age a negative factor) can fairly be characterized as 'stray remarks,' *even if the documents do not directly relate to the challenged employment decision."* (Emphasis added.)

In *Cooley, supra*, 25 F.3d at 1331, the court, in considering two ageist comments made by the employer outside the employment context about older people in general, stated that "[a]lthough those two quoted comments *were not made in the context of [plaintiff's] termination*, * * * they do help to reveal [the decisionmaker's] state of mind and reflect a deep-rooted, ongoing pattern that is anything but isolated." (Emphasis added.)

Similarly, in *Stacks v. Southwestern Bell Yellow Pages, Inc.* (C.A.8, 1994), 27 F.3d 1316, 1324, the court explained that:

"'Not all comments that reflect a discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision.' *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir.1993). Hudson's comments that 'women were the worst thing' that had happened to the company, however, warrants such an inference, *even though it was not made during the decisional process.*" (Emphasis added.)

Thus, an inference of discrimination with regard to a particular employment decision is permissible from general discriminatory comments, despite the fact that the comments "do not directly relate to the challenged employment decision," "were not made in the context of [plaintiff's] termination," or were "not made during the decisional process" at issue. Accordingly, the fact that McLernon's "remarks did not relate to Byrnes and Otto or the decisions to terminate their employment" does not preclude an inference of age discrimination.

Moreover, McLernon's comments, while perhaps made in reference to employees other than a vice president and a high level executive, nevertheless reflect, as the court of appeals stated, "inaccurate notions that middle age equated with lack of energy, loss of memory and deficits in aggressiveness." Also, as previously noted, McLernon's comments reflect an intent to act against older employees. I cannot agree that

McLernon's statements can only be construed as though he intended them to mean that he would discriminate on the basis of age only as to particular classifications of employees. It was perfectly reasonable for the jury to infer from these statements that McLernon's discriminatory motives carried over to other employment decisions and to other categories and classes of employees. Thus, the issue of whether McLernon's discriminatory state of mind was compartmentalized according to employee classifications was one of fact, which the jury resolved.

Additionally, I have some very serious reservations about endorsing any general rule that allows an employer to compartmentalize its discriminatory remarks when they prove to be disadvantageous to the employer's subsequent litigation posture. See *Lockhart v. Westinghouse Credit Corp.* (C.A.3, 1989), 879 F.2d 43, 54. There is no more reason to think that an employer's discriminatory attitudes necessarily differ from one group of employees to another than "[t]here is * * * reason to think those attitudes differ from hiring to promotion." *Equal Emp. Opportunity Comm. v. Alton Packaging Corp.* (C.A.11, 1990), 901 F.2d 920, 924, fn. 6. If we allow the employer to pigeonhole its discriminatory statements in this manner, we in effect remove the ultimate question of discrimination from the province of the jury and hand it over to one of the parties.

In its third error concerning what kinds of discriminatory comments are sufficient, the lead opinion implicitly concludes that the temporal remoteness of discriminatory comments should, of itself, bar any

inference that the bias expressed thereby entered into the decisional process. It explains as follows:

"The remarks [attributable to McLernon and other LCI executives] were distant in time * * * to plaintiffs' terminations. Lopez testified as to comments made in 1989, more than one year before these plaintiffs were terminated. Frasher's and Florek's testimony related to comments even more remote, dating back to 1985, years before either Byrnes or Otto became employees of LCI."

Discrimination law is "[l]ike the common law of torts," in part because legal liability is conditioned "on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind." (Emphasis *sic.*) *Price Waterhouse, supra*, 490 U.S. at 264, 264-265, 265, 109 S.Ct. at 1798, 104 L.Ed.2d at 297 (O'Connor, J., concurring). Under common-law tort principles, temporal remoteness is not a bar to a finding of causal connection. See Prosser & Keeton on Torts (5 Ed.1984) 283, Section 43; 2 Restatement of the Law 2d, Torts (1965) 434, Section 433, Comment *f.*

This principle has special force when applied in the context of evaluating expressions of discriminatory animus in an action for disparate treatment of an individual. This is because discriminatory animus does not necessarily dissipate after the lapse of some arbitrarily imposed period of time. As explained in *Wilson v. Aliceville* (C.A.11, 1986), 779 F.2d 631, 635, quoting the trial court:

"'Presumably, people don't pick up a racially prejudiced attitude overnight. The jury is entitled to consider that later than 1982, he [the decisionmaker] was referring to the plaintiff as a "goddam nigger." He felt that way about him when he wouldn't hire him. It's a jury question. And it's not too remote. In fact, I think I would have to oblige myself to human nature to agree with you.

"'If the man is prejudiced in late 1982, it's almost certain he was in early 1982. Now, if he was unprejudiced in late 1982, he might have learned something in the meantime. But people don't usually pick up racial prejudice overnight.

"'And if they have got it in late 1982, it is almost certain they had it in early 1982. At least the jury can so consider, and they have the right to consider it in the light of human experience. And that has been my human experience.'"

Thus, as the court in *Riordan v. Kempiners* (C.A.7, 1987), 831 F.2d 690, 698-699 pointedly explained: "Proximity in time to the alleged discrimination is a proper consideration in assessing probative value; but given the importance of circumstantial evidence in proving (and, equally, disproving) employment discrimination, a blanket exclusion of evidence of events that occurred before or after the discrimination is arbitrary."

In the case *sub judice*, Priscilla Frasher, Daniel Lopez and Ed Florek testified as to numerous discriminatory age-related statements made by

McLernon. Construing the evidence most strongly in favor of plaintiffs-appellees, *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 430, 344 N.E.2d 334, 338, the substance of the various statements reveals two things about McLernon: (1) he harbored a bias toward older workers, and (2) his intent was to clear out older employees. The statements were made in 1984, 1985 and 1989. Otto was terminated at the end of 1990 and Byrnes in early 1991.

The lead opinion would have us believe that although McLernon had discriminatory animus toward the aged worker from 1984 through 1989, and at times acted upon such an attitude, it is impermissible to infer that such deep-rooted, ongoing bias against older workers persisted into early 1991. Yet there is nothing to suggest that McLernon "might have learned something in the meantime" that served to eviscerate his animus. Instead, the lead opinion appears to view verbal expressions of prejudicial intent as though they are events which take place at particular moments in time. Thus, it is able to confine what is essentially McLernon's long-lasting and ongoing basic mental attitude or governing spirit to particularly circumscribed periods of time corresponding to the dates of his statements. However, I would have hoped that this court was a bit more sophisticated than to conclude, as a matter of law, that repeated expressions of discriminatory animus spanning a five-year period are but separate acts or occurrences each with a clearly delineated beginning and end.

Moreover, the only case cited by the lead opinion in support of any of its critical conclusions is *Phelps,*

supra, 986 F.2d at 1025.[2] Subsequent to *Phelps*, however, the Sixth Circuit Court of Appeals decided *Cooley, supra*. The court set forth the following pertinent facts:

"The jury believed Cooley's contention that * * * he was really fired as part of a corporate effort to clear out older employees. In the course of proving his contention, Cooley testified that Patrick [the president of Carmike Cinemas by whom Cooley was employed] despised older people. For example, he related that Reddish, who had previously held the higher corporate position of vice president and general manager in Columbus, Georgia, had once told him of a strange conversation with Patrick that had taken place on Thanksgiving Day. As Cooley remembered it, Reddish said to him:

---

[2] The lead opinion cites *Phelps* in support of the proposition that "comments which are isolated, ambiguous or abstract, or made in reference to totally unrelated employee categories cannot support a finding of age discrimination against employees in a wholly different classification." By way of clarification, *Phelps, supra,* 986 F.2d at 1025, does indeed explain that "isolated and ambiguous comments '"are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination."'" Also, in deference to the lead opinion, I would note that, even though not referred to in the lead opinion, the court in *Phelps* concluded that "[b]ecause McCulloch made the statements nearly a year before the layoff, the comments were made too long before the layoff to have influenced the termination decision." *Id.*, 986 F.2d at 1026. However, *Phelps* made no mention of any rule proscribing the use of evidence of a decisionmaker's discriminatory motive regarding one employment decision or category of employees to show that decisionmaker's motives regarding another employment decision or class of employees.

"'[On] Thanksgiving [Patrick] made the statement, "I got to go over to my mom's and dad's and have lunch today with them. * * * I don't want to go."'

"[Reddish] said, 'Well, Mike, why? This is Thanksgiving.'

"'And [Patrick's] words were, "Well, my grandmother is over there, and I just don't want to be—I don't like to be around old people."'

"Cooley further testified that, back in 1968, when Patrick was eighteen-years-old, he had come out of the movie theater after seeing 'Wild in the Streets' and said to Cooley, 'Yeah, I believe that. Everybody over 30 years old needs to be put in a pen. Yeah, if they don't want to be put in a pen, they should be confined to a concentration camp.'" (Footnote omitted.) *Id.*, 25 F.3d at 1329.

In reviewing the district court's decision to admit these statements, the court examined its previous decisions, including *Phelps*, dealing with the propriety of statements allegedly showing employer bias, and explained:

"* * * Patrick is the ultimate decision maker at Carmike, and Cooley had the burden to prove by the preponderance of the evidence that Patrick's resentful comments against the aged were not vague, ambiguous, or isolated. Although those two quoted comments *were not made in the context of Cooley's termination, and they had been made a long time before he was dismissed,* they do help to reveal Patrick's state of mind and reflect

a deep-rooted, ongoing pattern that is anything but isolated." (Emphasis added.)

Id., 25 F.3d at 1331.

Thus, even the single federal circuit cited throughout the entire lead opinion allows a finding of discrimination to be based on temporally remote general comments made outside the context of plaintiff's termination. In other words, the lead opinion relies exclusively on a case from a jurisdiction that has permitted the very so-called toothpaste tube theory which the lead opinion rejects.

In addition, the lead opinion seems singularly impressed with the trial court's determination that "98 percent of the evidence in the record doesn't have anything to do with age discrimination." I do not claim to have tested the mathematical accuracy of this determination, but I am not aware of any age or other invidious discrimination claim that has been decided on the basis of such a percentage. Moreover, under the direct evidence standard proposed in the lead opinion, the statement "I fired plaintiff on account of his age" would (and in fact is just about the only statement that could) suffice to prove age discrimination. This single statement, had it been uttered by McLernon, would constitute considerably less than the two percent of evidence that so troubles the lead opinion. Regardless, whether the evidence of McLernon's ongoing, deep-rooted, repeated expressions of bias and intent to discriminate against the aged worker constitute two percent, ten percent, or some other percentage of the evidence in the record, it certainly amounts to substantially more and better-quality evidence than is

generally considered sufficient to permit an inference of discrimination.

Thus, not only does the lead opinion's direct evidence standard, couched as it is in causative language, directly contravene *Mauzy* and the United States Supreme Court holdings, but its foundational assumptions are fallacious and actually contravene its own authority.

None of the foregoing, however, should be construed as an outright rejection of the application of principles of causation to an age discrimination case. Properly construed and applied, a legal standard of causation can be helpful in determining whether age was a motivating factor in an employment decision. The ultimate question in these cases is whether the plaintiff was "discharged on account of age." *Kohmescher, supra*, 61 Ohio St.3d at 505, 575 N.E.2d at 442. As we explained in *Mauzy, supra*, 75 Ohio St.3d at 587, 664 N.E.2d at 1280, "[f]ormer R.C. 4101.17 [now renumbered R.C. 4112.14], like Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, Section 2000*e et seq.*, Title 42, U.S.Code, is not a thought control law." Neither is R.C. 4112.02. "Thus, while proof of discriminatory thought is necessary to the establishment of a discrimination claim, it is not sufficient. There must be a consequential prohibited act." *Id.*, 75 Ohio St.3d at 588, 664 N.E.2d at 1280.

Accordingly, R.C. 4112.02 and 4112.14 are not designed in furtherance of a state policy to prohibit mere prejudice. Prejudice is simply an irrational opinion or attitude of hostility directed against a group or class of

people or their supposed characteristics. See Webster's Ninth New Collegiate Dictionary (1988) 928. Regardless of how distasteful or unsupported, prejudice is mere thought which, even if expressed, is not illegal. What these statutes prohibit is discrimination, *i.e.*, prejudice in action. An employer is free to believe whatever he or she wishes about protected groups or classes in society, so long as those beliefs do not influence his or her employment decisions.

Accordingly, no derogation of the statutes results from the imposition of a standard that requires a connection (or link or nexus) between the employer's negative beliefs about a particular group or class in society and the challenged employment action. In fact, when the plaintiff's evidence consists primarily of the employer's expressions of discriminatory animus, it is helpful to restate the ultimate issue in these terms. In this way, we can ensure that liability is not premised solely upon the employer's political or social beliefs about a protected class, but is instead properly based on whether those beliefs were actually brought to bear on employment decisions. This serves to facilitate the process of determining whether liability was based on prejudice or discrimination.

However, there is a critical distinction between stating, in causative terms, the requirement that plaintiff demonstrate that he or she was discharged on account of age and requiring that to do so the plaintiff must produce the type of evidence that directly proves discrimination without the aid of an inference. Indeed, it is mere trickery to require the plaintiff to produce direct evidence of discrimination in order to satisfy a causative

standard which restates a standard under which direct evidence is not required. Evidence of clear discriminatory statements made by a decisionmaker or company policymaker, like any other evidence, need not prove discrimination directly, without the aid of an inference, in order to support a finding of discrimination. Thus, evidence that a decisionmaker made discriminatory comments may support a finding of discrimination, even though an inference is required to connect the employer's state of mind expressed thereby to the challenged employment decision. In short, a discriminatory statement may constitute circumstantial evidence that a discriminatory motive was a factor in the decisional process at issue.

These principles were aptly stated as follows in *Stacks v. Southwestern Bell Yellow Pages, Inc.* (C.A.8, 1993), 996 F.2d 200, 201, fn. 1:

"We use this term ['demonstrate'] advisedly, in order to avoid the 'thicket' created by some courts' use of the term 'direct evidence' to describe the plaintiff's initial burden of proof in a *Price Waterhouse* case. *See, e.g., Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183-85 (2d Cir.1992) (describing use of the term 'direct evidence' as 'unfortunate'). We conclude that there is no restriction on the *type* of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision.

"We do not believe that our decision in *Beshears v. Asbill*, 930 F.2d 1348 (8th Cir.1991), mandates a different result. Although the *Beshears* court used the terms 'direct evidence' and 'indirect evidence,' it is clear that those terms were not used in their hornbook sense. In evaluating the evidence, the court stated that 'we conclude that *Asbill* did present evidence that may properly be characterized as "direct."' *Id.* at 1354. This evidence consisted of a statement by a decisionmaker 'to the effect that older employees have problems adapting to new employment policies.' *Id.* In hornbook terms, this statement constitutes circumstantial evidence (in that it requires an inference from the statement proved to the conclusion intended) that a discriminatory motive played a motivating factor in the challenged employment decision. We believe that the term 'direct evidence,' as used in *Beshears*, means only that the plaintiff must present evidence showing a specific link between discriminatory animus and the challenged decision." (Emphasis *sic*.)

The lead and concurring opinions are potentially a disdainful epitaph to *Mauzy*. Our brothers and sisters below will no doubt shake their heads in consternation at the precarious force of our mandates. In evaluating circumstantial evidence in an age discrimination case, trial courts are now invited to flip the *Mauzy/Byrnes* coin. They will query: Do we phrase the question in causative terms and require direct evidence, or is circumstantial evidence sufficient? Is *Barker's* four-element test for establishing a prima facie case a straight-jacket on the presentation of circumstantial evidence or one method of proof? The court today does not do justice to the law or to those below seeking a

definitive answer on how to proceed in these types of discrimination cases.

The decision of the court of appeals should be affirmed.

PFEIFER, J., dissenting. I believe that Justice Resnick's dissenting opinion correctly articulates both what the law now is and what the requirements for proof should continue to be in age discrimination cases in Ohio. While I am sympathetic with the result achieved by the majority, I would have taken different steps to correct what appears to be an excessive jury award. This case was well and truly tried, the parties skillfully represented, and the operative law correctly stated to the jury by the trial judge. We should wring the passion out of the jury's verdict by ordering remittitur on the general verdict and eliminating the punitive damages award. Instead, the majority has massaged and convoluted the law, rendering proof of an age discrimination case unrealistically difficult for persons who most need the law's protection.

I am concerned that this area of the law is being further "developed" in a case where the plaintiffs are high-salaried, executive-level employees. That world, artificial to most working men and women who truly need the protection of antidiscriminatory legislation, now yields a standard of proof which does not fit the real workplace world. Because we are uncomfortable seeing a jury award $7.1 million to two highly compensated executives who gladly, and knowingly, swam with sharks, we raise the bar on proof for others. This case makes age discrimination harder to prove and thus

impractical for lower level, lower paid, less educated employees, who do not have the resources to pursue an increasingly complicated and complex claim. Older employees at the bottom of the economic ladder, unlawfully demoted or discharged because of their age, and without a golden parachute to cushion their fall (or to finance their litigation), are the Ohioans the majority decision hurts most.

THE SUPREME COURT OF OHIO

	:	1997 TERM
	:	
Thomas J. Byrnes, et al.,	:	Case No. 95-1222
Appellees,	:	
	:	
v.	:	RECONSIDERATION
	:	ENTRY
LCI Communication	:	
Holdings Co., et al.,	:	(Franklin County)
	:	[entered 1/15/97]
Appellants.	:	

This cause came on for further consideration upon appellees' motion for reconsideration and the motion of the Ohio Chapter of the National Organization for Women et al. for leave to file motion for reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals Nos. 94APE091372 & 94APE091396)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Thomas J. Byrnes, et al.,	:	
	:	Nos. 94APE09-1372
Plaintiffs-Appellants,	:	and
	:	94APE09-1396
v.	:	
	:	(REGULAR CALENDAR)
LCI Communication	:	
Holdings Co., et al.	:	
	:	
Defendants-Appellees.	:	

OPINION

Rendered on May 2, 1995

Schwartz, Kelm, Warren & Ramirez, Russell A. Kelm and *Robert L. Eblin*, for appellants.

Jones, Day, Reavis & Pogue, Steven T. Catlett, Glen D. Nager and *Beth Heiftez*, for appellees.

David J. Robinson, for *Amicus Curiae* Ohio Chamber of Commerce.

Thomas J. Hart, for *Amicus Curiae* Ohio Manufacturers Association.

Spater, Gittes, Schulte & Kolman, Frederick M. Gittes, Kathaleen B. Schulte; and *Louis A. Jacobs*, for *Amicus Curiae* N.O.W. et al.

APPEALS from the Franklin County Court of Common Pleas.

TYACK, J.

On June 28, 1991, Thomas J. Byrnes and Richard C. Otto filed a complaint against LCI Communication Holdings Company et al., ("LCI") in the Franklin County Court of Common Pleas, alleging age discrimination in violation of R.C. 4112.02(A) and 4112.99. Mr. Byrnes and Mr. Otto had been employed by LCI, a long distance telecommunications company, until they involuntarily left the company in early 1991 and late 1990, respectively. Additional pertinent facts will be discussed as warranted below.

Eventually, a jury trial was held and, on October 27, 1993, the jury returned verdicts in favor of Mr. Byrnes and Mr. Otto. Mr. Byrnes was awarded $4,861,941 in compensatory damages and $2,000,000 in punitive damages. Mr. Otto was awarded $163,368 in compensatory damages and $100,000 in punitive damages. In addition, the trial court awarded Mr. Byrnes and Mr. Otto $515,782 and $145,359, respectively, for the value of lost stock rights. Mr.

Byrnes and Mr. Otto were also given an award of attorneys' fees.

The jury verdicts were entered via a judgment entry filed on October 29, 1993. On November 12, 1993, LCI filed a motion seeking in the alternative a new trial, judgment notwithstanding the verdict, or remittitur of the jury awards. On September 16, 1994, the trial court filed a judgment entry, overruling LCI's motion.

All parties have appealed the final judgment. LCI asserts the following errors:

"FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING UNSUBSTANTIATED CLAIMS OF DISCRIMINATION OF OTHER LCI EMPLOYEES.

"SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING ALLEGED 'AGE-RELATED' STATEMENTS THAT LCI MANAGERS SUPPOSEDLY MADE ABOUT OTHER LCI EMPLOYEES.

"THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING LCI'S MOTION FOR JNOV BECAUSE THE EVIDENCE PRESENTED TO THE JURY

WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING THAT PLAINTIFFS WERE TERMINATED BECAUSE OF THEIR AGE.

"FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS ADDITIONAL DAMAGES FOR RIGHTS TO SHARES OF LCI STOCK.

"FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY DENYING LCI'S MOTION FOR A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON LEGALLY INVALID BACK PAY AND FRONT PAY DAMAGES AWARDS.

"SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY DENYING LCI'S MOTION FOR A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON LEGALLY INVALID PUNITIVE DAMAGES AWARDS.

"SEVENTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY AWARDING ATTORNEYS['] FEES TO PLAINTIFFS."

Mr. Byrnes and Mr. Otto (hereinafter "appellees") assign the following as error:

> "1. The trial court erred by reserving for its own decision, as opposed to allowing the jury to decide, the amount of damages to be awarded to Plaintiff-Appellants for stock they would have received had they remained as employees.
>
> "2. The trial court erred in failing to award Plaintiffs-Appellants their reasonable attorney[s'] fees, including those for all claims at trial and those incurred for post-verdict work.
>
> "3. The trial court erred in denying Plaintiffs-Appellants' prejudgment interest on their back pay claims awarded by the jury."

In its first and second assignments of error, LCI asserts that testimony regarding claims of other LCI employees and statements made about other LCI employees should have been excluded from evidence. However, LCI failed to object to any of the specified testimony as it occurred and, thus, has waived the issue absent a finding of plain error. See *Moss v. Nationwide Ins. Co.* (1985), 24 Ohio App.3d 145, 148. Since we do not find the existence of plain error, we overrule these two assignments of error.

In the third assignment of error, LCI asserts that the trial court erred in overruling its motion for judgment notwithstanding the verdict ("JNOV"). In addressing this assignment of error, we are required to apply a very

rigorous test. In *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, quoting *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, the Supreme Court of Ohio stated:

> "'The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. ***'"

The trial court does not weigh the evidence or test the credibility of the witnesses in considering a motion for JNOV. *Id.* at syllabus. However, when deciding such a motion, which involves a question of law, it is necessary to review and consider the evidence. *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus.

Appellees claimed that LCI terminated them in violation R.C. 4112.02(A). R.C. 4112.02(A) makes it illegal:

> "For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to

discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

Appellees also tried to prove at trial that LCI violated R.C. 41101.17(A), which states:

"No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee."

The most recent guidance from the Supreme Court of Ohio in applying these statutes is set forth in the syllabus to *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501. The syllabus reads:

"Absent direct evidence of age discrimination, in order to establish a prima facie case of a violation of R.C. 4101.17 in an employment discharge action, a plaintiff-employee must demonstrate (1) that he or she was a member of the statutorily protected class, (2) that he or she was discharged, (3) that he or she was qualified for the position, and (4) that he or she was replaced by, or that the discharge permitted the retention of, a person not belonging to the protected class. (*Barker v. Scovill, Inc.* [1983], 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807,

paragraph one of the syllabus, modified and explained.)"

LCI also directs us to *Barker v. Scovill* (1983), 6 Ohio St.3d 146, and argues that appellees did not demonstrate the fourth part of the test in both cases.

Barker adopted for use in age discrimination cases the evidentiary standard and guidelines set forth in *McDonnell Douglas v. Green* (1973), 411 U.S. 792. Under *Barker* and *McDonnell Douglas*, once the former employee satisfies the four parts of the initial test, the burden shifts to the employer to set forth a legitimate nondiscriminatory reason for the plaintiff's discharge. *Barker* at 148. If the employer establishes such, the former employee must then show that the employer's articulated reasons was merely pretext for unlawful discrimination. *Id.* (Citations omitted.)

In *Kohmescher*, the Supreme Court of Ohio modified the requirements set forth in *Barker* for situations where "direct evidence of age discrimination" existed. In the *Kohmescher* case, a memorandum existed which indicted that Mr. Kohmescher was going to lose his job during a reduction in force, at least in part because Mr. Kohmescher was "eligible for retirement window." This memorandum was construed by the Supreme Court of Ohio as "direct evidence" of discrimination. The Supreme Court did not completely clarify what else would constitute "direct evidence" of discrimination. Indeed, the choice of the phrase "direct evidence" in discrimination situations is troublesome since discrimination usually involves a mental process and

there is no direct evidence of a mental process, given our current state of medical knowledge.

The significance of the *Kohmescher* case, we believe, is its core findings that age discrimination can be proved in situations which do not fit the test set forth in the earlier *Barker* case. The question then becomes whether either Mr. Byrnes or Mr. Otto or both present examples of age discrimination which can support a jury verdict without satisfying the strict requirements of *Barker*.

Mr. Byrnes had been president and chief operating officer ("COO") of LCI. He was fifty-one at the time of his termination. He was temporarily replaced by the then chief executive officer ("CEO"), Lawrence McLernon, who was fifty-two at the time. The evidence before the trial court could be construed to indicate that Mr. McLernon expected to replace Mr. Byrnes with a younger man named Kindley, but that Mr. McLernon himself was replaced as CEO before the transfer of responsibility to Mr. Kindley actually occurred.

Mr. Otto had served as a consultant to LCI before he accepted regular employment. After he became employed, he was assigned to head up LCI's Acquisition, Due Diligence and Integration Team ("ADDIT"). He also was named vice president of standards and analysis. He was replaced in his responsibilities with ADDIT by an individual who was over ten years younger. His responsibilities as a vice-president were distributed among two other individuals.

Thus, as noted above, neither individual presents a fact situation which survives a strict application of the

trial court set forth in *Barker*. However, we do not believe that a corporation can insulate itself from liability by simply reassigning duties for a period of time with the intention of hiring a younger person in the future. Otherwise, a large company could simply reassign responsibilities to an older employee and then allow the older employee to retire a short time later, only then to be replaced by a much younger employee. Thus, the syllabus to *Kohmescher* causes a beneficial result by allowing exception to the strict rule in *Barker*.

On this appeal, Mr. Otto and Mr. Byrnes assert that they should be permitted to recover if they demonstrate the existence of a pattern of hiring and firing by LCI in which LCI hired older, experienced management employees; acquired the benefit of their knowledge and experience; and then discarded the employees once their knowledge and experience had been assimilated into the company. The analogy used is to buying a full tube of toothpaste, squeezing the contents from the tube, then throwing the tube away once the tube has served its purpose.

We believe that upon proof of such a pattern of employment practices, recovery can be had since the proof would establish discrimination as to the tenure of employment for purposes of R.C. 4112.02(A) or discriminatory discharge for purposes of R.C. 4101.17(A).

To address the actual question propounded in the third assignment of error, namely whether or not a JNOV should have been granted, we must then determine whether or not Mr. Byrnes and Mr. Otto

established at trial the existence of the pattern they allege. Turning to the actual evidence, we learn that in 1983 Lawrence McLernon founded Litel Communication Corporation which later became LCI. Mr. Otto was hired as a consultant in 1985. In 1988, a leveraged buyout of the company occurred. As part of the leveraged buyout, Mr. Byrnes was brought in as president and COO of LCI. Mr. McLernon remained CEO and chairman of LCI. Edward Florek had been a director of sales at LCI. At trial, Mr. Florek testified that Mr. McLernon devised a theory for a sales associate program wherein a young, inexperienced person would be teamed with an older, experienced salesperson. Mr. Florek thought the concept was a good idea but that financially, LCI was not in a position to implement it. When Mr. McLernon pressed him on the concept, Mr. Florek questioned why Mr. McLernon was so adamant given the company's finances. Mr. Florek testified that Mr. McLernon's response was "[t]hose old farts you hired aren't going to be around forever." Mr. Florek also testified that John Janis, senior vice-president of sales and marketing, told Mr. Florek to implement the program to hire younger salespersons. This sales associates program was never fully implemented, but Mr. Florek testified that everything he saw and heard gave him belief that Mr. McLernon's philosophy was to eliminate many of the older persons they had previously hired.

Mr. Florek also testified as to statements made by Senior Vice-President Janis about specific individuals. Apparently, Mr. Janis was dissatisfied with a certain employee's performance and said to Mr. Florek "[w]e've got an old bulldog in the position and we need to replace

him with someone smoother." Mr. Florek also testified that Mr. Janis did not like the style of another salesperson. Mr. Florek disagreed and told Mr. Janis that this salesperson was good over the long haul, "a marathoner." Mr. Janis responded "I don't want old marathoners in my sales organization. I want young sprinters." Mr. Florek testified that both employees were terminated.

Daniel Lopez, another former employee of LCI, testified that Mr. McLernon told him he was dissatisfied with the marketing division at LCI and that the only way to turn it around was to hire young, aggressive staff managers and get rid of the "old folks." Mr. Lopez testified that the marketing division at LCI had indeed experienced a series of failures and that Mr. McLernon felt the "older folks" could no longer contribute and that the way to go was to find hardworking, young, feisty types. Mr. Lopez testified that Mr. McLernon stated a particular employee was over the hill and too old to grasp Mr. McLernon's concepts. Mr. McLernon also told Mr. Lopez that another employee had been terminated at LCI because he was too old and tired for the business and had given up.

Priscilla Frasher was hired when Mr. McLernon had first started the company and was Mr. McLernon's first executive secretary. She was terminated just prior to the end of her ninety-day probationary period. Ms. Frasher, who was over fifty at the time she was hired, testified that she was later informed by a vice-president of LCI that she had been fired so that someone younger could replace her for less pay.

Thomas Byrnes testified at length about his background and service at LCI. He indicated that his relationship with CEO McLernon took a significant turn for the worse when Kindley was hired. Kindley told many people in LCI that he was going to be the next president. Several conversations occurred which led Mr. Byrnes to believe that Mr. McLernon was trying to antagonize him to the point of Mr. Byrnes submitting his resignation. In one such conversation, Mr. McLernon inquired as to whether Mr. Otto was suffering from Alzheimer's disease, knowing that Mr. Byrnes held Mr. Otto in high regard.

We believe that this testimony was sufficient to establish a pattern of termination because of age, regardless of the services being performed by the employees. Lawrence McLernon at all pertinent times was CEO and the person who made the ultimate decision as to who was hired and who was fired. He apparently appreciated the benefits of hiring mature management employees but, also, had inaccurate notions that middle age equated with lack of energy, loss of memory and deficits in aggressiveness. Any time the company did not perform to his expectation, these inaccurate notions made it easy for him to fire the mature employees. A sufficient pattern of discrimination was demonstrated to withstand a motion for JNOV.

The third assignment of error is overruled.

LCI's fourth assignment of error and Mr. Byrnes and Mr. Otto's first assignment of error both address the damages awarded by the trial judge for losses related to

a stock agreement. These assignments of error will be addressed together.

LCI argues that Mr. Byrnes and Mr. Otto would have been fired in mid-1991, when Lawrence McLernon was fired as CEO. As a result, LCI suggests their damages should have been assessed as if a firing which was not tainted by age discrimination would have occurred in mid-1991, as opposed to the early 1991 or late 1990 dates presented by Mr. Byrnes and Mr. Otto at trial.

We cannot assume that the new CEO of LCI would have failed to appreciate the experience and talent which Mr. Byrnes and Mr. Otto provided to LCI. As a result, we are unwilling to accept as a given that either man would have been fired in mid-1991. Therefore, we find no merit in LCI's argument.

LCI also argues that the trial court improperly failed to credit against damages sums paid by LCI to Mr. Byrnes and Mr. Otto. The trial judge, in determining the damages attributable to the termination, carefully distinguished between the sums due to Mr. Byrnes and Mr. Otto as a result of their contractual relationship with LCI in existence as of the date of termination from additional stock which would have been awarded had the wrongful termination not occurred. Contrary to LCI's allegation, the trial judge carefully distinguished the two sums and assured that double damages were not awarded.

Therefore, LCI's fourth assignment of error is overruled.

The first assignment of error on behalf of Mr. Byrnes and Mr. Otto is also overruled. Although as a general rule the award of damages should be made by the jury, the stock-related compensatory damages were appropriately computed by the trial court based upon written contracts. Therefore, the error of the trial judge computing this portion of the damages is harmless.

LCI's fifth and sixth assignments of error present additional theories as to why a new trial on JNOV should have been granted. The first theory asserts that the back pay and front pay awards were "legally invalid." As to Mr. Otto, the back pay award corresponded precisely with his computation of his losses up to the day of trial. His testimony fully supports the back pay award given.

As to the front pay for Mr. Otto, the jury awarded a limited period of front pay, apparently on a theory that his retirement would have been imminent. This award also properly corresponds with the evidence.

As to Mr. Byrnes, the jury awarded a lengthier period of front pay, a ten-year award. The testimony before the trial court indicated that the number of comparable positions as chief operating officer of a major long-distance telecommunications company are relatively few. Mr. Byrnes was bound not to take a position with a competitor until over a year after the end of his employment. He pursued a variety of upper-level management prospects but was considered over-qualified on one occasion and not the best match with the employer on another occasion. His acceptance of a teaching position apparently was the best choice

available. The front pay award, although lengthy, was not unreasonable.

The fifth assignment of error is overruled.

The substance of the sixth assignment of error was addressed by a different panel of this court in *Sutherland v. Nationwide Gen. Ins. Co.* (1994), 96 Ohio App.3d 793. We believe that punitive damages awards are appropriate in discrimination cases. Although the facts here are not as egregious as those in *Sutherland*, the legal principles are the same. The sixth assignment of error is also overruled.

This court has also recently addressed the question of whether attorney's fees are appropriate in discrimination cases. In a more recent *Sutherland* case, *Sutherland v. Nationwide Gen. Ins. Co.* (Mar. 30, 1995), No. 94APE09-1282, unreported (1995 Opinions 1359), we found that attorney's fees awards were appropriate in discrimination cases warranting punitive damages. Therefore, reasonable attorney's fees were appropriate here. LCI's seventh assignment of error is overruled.

Mr. Otto and Mr. Byrnes assert in their second assignment of error that the attorneys' fees awarded were not reasonable, in part because the actual fees were based upon a one-third contingency. Although we respect the legitimacy of a contingent fee arrangement in discrimination cases, we believe that a court-ordered award of attorneys' fees need not be based upon a contingent fee contract. The trial judge awarded what he thought was a reasonable fee, feeling that a contingent fee was excessive. We believe the trial judge was within

his discretion in his ruling, so we overrule the assignment of error.

The final assignment of error asserted by Mr. Byrnes and Mr. Otto asserts that pre-judgment interest should have been granted as to the back-pay award. They direct our attention to the second paragraph of the syllabus to *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89, which reads:

> "Prejudgment interest on a back pay award that is calculated from the time the aggrieved party was discriminated against is a proper measure of damages in an employment discrimination case."

At page 93 of the opinion, the Supreme Court of Ohio stated:

> "As the foregoing cases suggest, interest should begin to run on a back pay award under R.C. 4112.05(G) from the time at which the party was discriminated against, in order to restore victims to the economic position they would have been in had no discrimination occurred. To rule otherwise would in effect give the employer an interest-free loan until the damages are liquidated in an official determination. ***"

Under the circumstances, we feel compelled to order interest as to the back-pay award. The third assignment of error as to Mr. Byrnes and Mr. Otto is sustained.

In sum, all seven assignments of error filed on behalf of LCI are overruled. The first and second assignments of error on behalf of Mr. Byrnes and Mr. Otto are also overruled. The third assignment of error on behalf of Mr. Byrnes and Mr. Otto is sustained. As a result, the judgment of the trial court is affirmed except as to its refusal to award pre-judgment interest as to the back-pay award. The case is remanded for the filing of a new judgment entry which computes and grants such interest.

Judgment reversed and cause remanded with instructions.

YOUNG, J., concurs.
CLOSE, J., dissents.

CLOSE, J., dissenting.

I believe that the two legal standards, one of which must be observed in each discrimination case, exist for significant reasons. Neither test was met under the facts established here. Off-the-cuff remarks and intemperate language, while insensitive and even offensive, should not be the basis for a claim of age discrimination.

The test established in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, was designed to ensure that a plaintiff met specific criteria before the burden of going forward shifted to defendant. Among the necessary criteria is the requirement that plaintiff show that he or she is a member of a statutorily protected class and that he or she was replaced by a person not belonging to the protected class.

The Ohio Supreme Court qualified the *Barker* test eight years later when it added the phrase, "[a]bsent direct evidence of age discrimination" in its decision in *Kohmescher v. Kroger Co.* (1991), 6 Ohio St.3d 501. It is clear that the Supreme Court recognized that it is not necessary to establish the prima facie test set forth in *Barker*, where there is direct evidence of age discrimination. *Kohmescher* involved a memo which clearly and directly indicated that age discrimination was taking place.

While here, there were many instances of insensitive comments with respect to other personnel, there was no direct evidence that age discrimination took place, particularly as it related to appellees. In each of the comments cited by the majority, we can only *infer* that age was the cause for termination. Unlike *Kohmescher*, there is no direct evidence in the instances cited here and, certainly, no direct evidence with respect to appellees.

Although the majority cites a number of instances which they feel demonstrate a pattern of age discrimination, this does not satisfy the direct evidence test in *Kohmescher*. In each of these instances, we are not even dealing with the same employees. Further, most of those statements reflect an attitude and not action based on age. Clearly, the statements are not direct evidence of age discrimination, as it relates to appellees herein. Appellees should not be able to get around the evidentiary requirements of *Barker* based on inferences created from statements and any attitudes associated with them.

I would reverse the judgment of the trial court for failure to meet the fourth prong of the *Barker* test, namely that appellees were not replaced by a person who was not a member of the protected class.

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

Thomas J. Byrnes, et al.,	:	Case No. 91CVH06-5143
	:	
Plaintiffs,	:	DAVID W. FAIS, JUDGE
	:	(JUDGE COX BY
v.	:	ASSIGNMENT)
	:	
LCI Communication	:	
Holdings Co., et al.,	:	[entered 9/16/94]
	:	
Defendants.	:	

JUDGMENT ENTRY

This matter came before the Court on various motions following the October 19, 1993, entry of Judgment upon the jury's verdicts and the entry of Judgment as to vested stock valuation, including (1) plaintiffs' Motion to Modify Entry on Vested Stock Valuation, filed November 2, 1993; (2) Motion of Defendants for New Trial or, in the alternative, Judgment Notwithstanding the Verdict, or, in the alternative, Remittitur, filed November 12, 1993; (3) plaintiffs' Motion for Award of Prejudgment Interest, filed May 6, 1994, (4) plaintiffs' Application to Set Attorney's Fees, filed December 17, 1993; and (5) plaintiffs' claimed entitlement to additional management stock and management incentive stock pursuant to the Subscription and Stockholders' Agreement of November 15, 1988.

On October 29, 1993 and January 26, 1994, the Court held evidentiary hearings with respect to the referenced matter at which time the Court received evidence and heard arguments from counsel with respect to the above-referenced motions and claims. Based upon the briefs of the parties, the evidence adduced, and the arguments of counsel, and after due consideration, the Court, on August 31, 1994, rendered a Decision with respect to all of the above motions and claims except plaintiffs' Application to Set Attorney's Fees. For the reasons set forth in the Decision of August 31 and the Judgment Entry of August 31, it is hereby ADJUDGED AND DECREED as follows:

ADJUDGED AND DECREED that defendants' Motion for a New Trial Judgment Notwithstanding the Verdict, or Remittitur is OVERRULED in its entirety and the judgment entered October 29, 1993 upon the verdicts of the jury remains in effect, and it is further

ADJUDGED AND DECREED that judgment be, and hereby is, rendered in favor of plaintiff Richard C. Otto, and against defendants in the amount of $145,359.00, plus interest at the legal rate from the date of this entry, representing the value of stock that plaintiff would have received but for his termination by defendants. This judgment is in addition to the jury award and in addition to the amount plaintiff is entitled to receive for his vested stock as valued by J. C. Bradford & Co.; and it is further

ADJUDGED AND DECREED that judgment be, and hereby is, rendered in favor of plaintiff, Thomas J.

Byrnes, and against the defendants in the amount of $515,781.88, plus interest at the legal rate from the date of this entry, representing the value of the stock that plaintiff would have received but for his termination by defendants. This judgment is in addition to the jury award and in addition to the amount plaintiff is entitled to receive for his vested stock as valued by J. C. Bradford & Co.; and it is further

ADJUDGED AND DECREED that plaintiffs' Motion to Modify Entry on Vested Stock Valuation is OVERRULED and that defendants' payments to plaintiffs for vested stock shall continue to be governed by the court's Entry of October 29, 1993,; and it is further

ADJUDGED AND DECREED that plaintiffs' Motion for an Award of Prejudgment Interest is OVERRULED; and it is further

ADJUDGED AND DECREED that plaintiffs' Application to Set Attorney's Fees is granted and, in accordance with the Judgment Entry of August 31, 1994, judgment be, and hereby is, rendered in favor of plaintiffs and against defendants in the amount of $337,918.60 for attorney's fees and costs, and it is further

ADJUDGED AND DECREED that costs be assessed against defendants to the extent not previously included in the costs awarded with attorney's fees above.

/s/
DONALD COX, BY ASSIGNMENT
DAVID W. FAIS, JUDGE

Copy to:

Russell A. Kelm
Robert L. Eblin
Schwartz, Kelm, Warren & Rubenstein
41 South Third Street, Suite 2300
Columbus, Ohio 43215

Counsel for Plaintiffs

John R. Gall
James D. Thomas
Squire, Sanders & Dempsey
41 South High Street, 1300
Columbus, Ohio 43215

Jacques M. Wood
Paul J. Corrado
Buchanan Ingersoll Professional Corporation
600 Grant Street, 56th floor
Pittsburgh, PA 15219-2887
Counsel for Defendants

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

Thomas J. Byrnes, et al.,	:	Case No. 91CVH06-5143
	:	
Plaintiffs,	:	DAVID W. FAIS, JUDGE
	:	(JUDGE COX BY
v.	:	ASSIGNMENT)
	:	
LCI Communication	:	
Holdings Co., et al.,	:	[entered 9/16/94]
	:	
Defendants.	:	

DECISION

Rendered this 31 day of August, 1994.

COX, J.

This cause is before the Court upon several motions and for a determination of damages with regard to certain stock options held by Plaintiffs.

First, the Court shall discuss the stock options portion of this opinion. The Court finds that Plaintiffs, Thomas J. Byrnes and Richard Otto (hereinafter "Byrnes" or "Otto" or collectively as "Plaintiffs"), were employed by LCI Communications, Inc. ("LCI"). Byrnes was employed in 1988 as president and chief operating officer. Otto was employed in 1985 and served as a vice president of the company and was responsible for a

variety of functions over the term of his employment. In 1988 Byrnes and Otto along with the other senior executives of the company received shares of LCI stock under the terms of the Subscription and Stockholder's Agreement dated November 15, 1988. Both Byrnes and Otto were entitled to receive shares of "Management Stock" and shares of "Management Incentive Stock".

The agreement provided that Byrnes was eligible to receive 4,730 shares of Management Stock and 5,405 shares of Management Incentive Stock under certain specified conditions defined in the agreement. Otto was eligible to receive 2,027 shares of Management Stock and 1,014 shares of Management Incentive Stock.

The Court finds that upon the termination of Byrnes and Otto 40 percent of their management shares of stock were vested. Byrnes, at that time, was entitled to receive 1,892 shares of Management Stock and Otto was entitled to receive 810.8 shares of Management Stock. The Court finds that at the time of their terminations none of the Management Incentive Stock had vested because a "triggering event", as defined in Section 1.8 of the Stockholder's Subscription Agreement, had not yet occurred.

The Court finds that a "triggering event" did occur in August 1993 when a public offering of stock occurred following a public offering of common stock in May 1993. The internal rate of return requirement of Sections 1.7 and 1.8 of the Stockholder's Subscription Agreement was met by the initial public offering.

The Court finds that the jury determined that Plaintiffs were victims of age discrimination and were terminated by reason of their age. The Court further finds that Plaintiffs as a result of the jury determination are entitled to receive those shares of stock they were eligible to receive under the Shareholder's Subscription Agreement. The Court finds the testimony that was presented concerning events and developments occurring after new management took control of the company to be totally irrelevant to the question of the amount of stock or the value of the stock that Plaintiffs would have received except for the unlawful termination.

Plaintiffs are entitled to receive those shares of stock that they would have received if not for the unlawful termination. Plaintiffs claim that they are entitled to receive the benefits of new agreements that were negotiated by new officers of the company. This claim is highly speculative and cannot constitute an appropriate measure of damage. This Court will not speculate on the value of the company assuming Plaintiffs had not been discharged. Neither will the Court speculate as to the extent the Plaintiffs would have been able to negotiate better compensation and stock agreements.

Defendants' insistence that the Court value all the stock at "market value" and then deduct the J.C. Bradford valuation is disturbing in that it seeks to treat two separate and distinct causes of action the same and applies the same measure of damages. It also yields a totally ludicrous result that undermines the basic premise of the jury determination.

The Court finds that there are two different and distinct valuation questions at issue:

> (1) What is the value of the 40% of the Management Shares that were vested upon termination of the plaintiffs?
>
> (2) What is the value of the remaining 60% of the Management Shares and the Management Incentive Shares that Plaintiffs would have received had not the unlawful termination occurred.

Both parties seek to suffer from the same delusion that the two questions are joined. The two questions are totally separate and the solutions must be determined separately. The first question is answered by interpreting the Shareholder's Subscription Agreement ("SSA") and is a contract dispute.

The second question involves the application of equitable principles to compensate Plaintiffs for the age related discharge. The valuation reached by J.C. Bradford for the vested stock has nothing to do with an appropriate valuation of the remaining shares.

The Court finds that Plaintiff Thomas J. Byrnes would have received an additional 2,838 shares of Management Stock and 5,405 shares of Management Incentive Stock under the SSA had his employment not been unlawfully terminated.

The Court finds that Plaintiff Richard Otto would have received 2,027 shares of Management Stock and

1,014 shares of Management Incentive Stock under the SSA had his employment not been unlawfully terminated.

In determining the value of these shares the Court finds that Plaintiffs are entitled to received the benefit of a 50% stock split which increases the number of Thomas J. Byrnes' shares to a total of 13,310.5 shares and the number of Richard Otto's shares to 3,751.2.

The Court finds that any attempt to extrapolate the number of shares Plaintiffs might have received under the 1992 Stock Option Plan would be speculative. The Court cannot ascertain with any degree of certainty that a 1992 Stock Option Plan would have even existed had Plaintiffs still been employed in their positions. It is just as logical to assume the company would be bankrupt had they remained. The fortuitous events that occurred after their departure cannot be assumed to have happened as a result of their efforts or in spite of their efforts.

The Plaintiffs are entitled to equitable relief, including damages for benefits they would have received but for their unlawful terminations. *Worrell v. Multipress, Inc.* (1989), 45 Ohio St.3d 241. Plaintiffs' rights to additional stock vesting are benefits that would entitle Plaintiffs to equitable relief. *Courtney v. Safelite Glass Corp.* (D. Kansas 1992), 811 F. Supp. 1466.

The Plaintiffs should be given the benefit of their original agreement without speculation as to what other events may or may not have occurred had Plaintiffs' employment continued. The Court finds that the jury verdict was filed on October 29, 1993. The market value

of LCI stock on October 29, 1993 was $38.75 per share. The Court finds that Plaintiff Richard Otto is entitled to receive $38.75 per share for each of 3,751.2 shares for a total of $145,359.00. The Court finds that Plaintiff Thomas Byrnes is entitled to receive $38.75 per share multiplied by 13,310.5 shares for a total award of $515,781.88.

IT IS hereby ORDERED that judgment in the amount of $145,359.00 in favor of Richard Otto and $515,781.88 in favor of Thomas Byrnes and against Defendants. This judgment is in addition to the previous award by J.C. Bradford and in addition to the jury award.

Turning next to the post-verdict motions. First, Plaintiffs move to modify the October 29, 1993, Entry regarding the 40% vested portion of Plaintiffs' stock. Plaintiffs have set forth two proposed modifications, each of which shall be addressed separately.

Plaintiffs initially argue the interest rate is incorrect and does not comply with §7.3(b) of the Subscription and Stockholders' Agreement ("Agreement"). Particularly, Plaintiffs contend the interest rate, as defined in §7.3(b), is the higher of the IRS imputed interest rate or the prime rate of Citibank on the calculation date. Based upon this, Plaintiffs argue the 6% rate contained in the Entry should be 10% for Otto and 9.5% for Byrnes.

Defendants counter Plaintiffs have applied the incorrect calculation date. Specifically, Defendants maintain the calculation date is September 22, 1993. This is based upon the Agreement language which states

the calculation date can either be the last day of the month in which the person ceases to be an employee or such other date as "the context clearly requires." Here, Defendants argue, the context clearly requires the calculation date be set at the commencement of the valuation process, September 22, 1993.

The Court has thoroughly reviewed the submitted memoranda and Agreement. Based upon this review and this Court's previous ruling, the Court finds the calculation date is to be set at the commencement of the valuation process, September 22, 1993, and the interest rates reflected in the October 29, 1993, Entry are correct.

Accordingly, the Court finds the motion of Plaintiffs to modify not to be well-taken and hereby OVERRULES the same.

Next, Defendants move, alternatively, for a new trial, judgment notwithstanding the verdict, or remittitur. Turning first to Defendants' motion for a new trial, Defendants have set forth essentially four arguments in support of their motion. First, the admission of testimony that LiTel employees other than Plaintiffs were discharged because of their age contravenes Evid. R. 403(A) and 602. Specifically, with regard to Evid. R. 602, Defendants maintain Plaintiffs failed to offer any evidence that the witnesses had personal knowledge that any former employees were discharged because of age. Regarding Evid. R. 403(A), Defendants contends exclusion of this testimony was mandatory since the probative value was far outweighed by the prejudicial effect of the testimony.

Second, the admission of testimony regarding inflammatory comments made by LiTel managers was in violation of Evid. R. 403(A). In particular, Defendants claim the testimony was inadmissible because the age-related comments substantially pre-dated Plaintiffs' terminations, were attributed to those not responsible for Plaintiffs' terminations, and/or were related to employees other than Plaintiffs.

Third, Defendants argue the verdicts are not sustained by the weight of the evidence in that, after weighing the evidence, it is clear the jury's verdicts rest on little more than passion, prejudice, and conjecture.

Plaintiffs counter the evidence offered by them that older employees were no longer with LiTel, along with evidence of a plan to acquire the knowledge of an older employee then terminate them, and evidence of discriminatory comments made by LiTel managers, was presented as direct proof of discriminatory animus. Therefore, Plaintiffs argue the evidence was relevant, probative of a discriminatory animus, and was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Fourth, the jury instructions were erroneous. Specifically, they failed to define "pattern and practice" and the issue of front pay was incorrectly submitted to the jury. Plaintiffs argue they did not need to establish statistical evidence of a pattern or practice since there was direct evidence establishing discrimination; therefore, it was unnecessary to define "pattern and practice."

Defendants have alleged four ground for a new trial under Civ.R. 59(A): (1) excessive damages appearing to have been given under the influence of passion or prejudice (Civ.R. 59(A)(4)); (2) judgment not sustained by the weight of the evidence (Civ.R. 59(A)(6)); (3) judgment contrary to law (Civ.R. 59(A)(7)); and (4) error or law occurring at the trial and brought to the attention of the trial court. Each of the first three grounds above relates to the legal sufficiency of the evidence.

When considering a motion for a new trial based upon the weight of the evidence, we have a duty to review the evidence and pass upon the credibility of the witnesses and the evidence in general. *Poske v. Mergl* (1959), 169 Ohio St. 70, 73-74. We may not, however, usurp the jury's function in weighing the evidence. The Court's role in weighing the evidence here is restricted to a determination of whether or not manifest injustice has been done and whether or not the verdict is against the manifest weight of the evidence. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraph three of the syllabus. The jury's verdict cannot be set aside based upon a "mere difference of opinion between the court and the jury." *Poske* at 74. Where the verdict is supported by competent and apparently credible evidence, a new trial will not be granted. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

Essentially all of the arguments espoused by Defendant, with the exception of Defendants' arguments concerning the jury instructions, were previously addressed by this Court in their motion *in limine*. The Court has again reviewed these arguments, under the

standard enumerated in Civ. R. 59, and found them to be meritless. There is competent credible evidence to support the verdicts. As to the jury instructions, the Court finds no error.

Accordingly, the Court finds the motion of Defendants for a new trial not to be well-taken and hereby OVERRULES the same.

Next, Defendants move for judgment notwithstanding the verdict, pursuant to Civ.R. 50(B). Defendants argue Plaintiffs failed to establish age discrimination by either direct or circumstantial evidence and even assuming Plaintiffs established a *prima facie* case of age discrimination, Plaintiffs failed to meet their ultimate burden of proof.

The test to be employed by this Court in determining whether to sustain a motion for j.n.o.v. is whether the Defendants are entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the Plaintiffs. *Cataland v. Cahill* (1984), 13 Ohio App.3d 113. Furthermore, in considering the motion, a court does not weigh the evidence or test the credibility of the witnesses. *Osler v. Lorain* (1986), 28 Ohio St.3d 345.

After construing the evidence in the light most favorable to Plaintiffs, the Court finds there is substantial evidence to support Plaintiffs' position upon which reasonable minds may differ. Accordingly, the Court finds the motion of Defendants for j.n.o.v. not to be well-taken and hereby OVERRULES the same.

Next, Defendants move this Court to reduce the punitive damages and front and back pay awards by remittitur. With regard to punitive damages, Defendants maintain this type of damages is not allowed in age discrimination cases and even assuming they are, the amount must be set by the Court. As to front and back pay, Defendants contend the awards are speculative and excessive. Lastly, Defendants argue the Court erroneously excluded evidence that would have shown Byrnes failed to mitigate his damages.

Plaintiffs counter first, Defendants failed to object to many of the arguments set forth in their motion. Additionally, Plaintiffs contend generally, the jury instructions were correct and the punitive damages are not only authorized by Ohio law, they were properly awarded in this case and were not influenced by passion or prejudice.

A court may grant a remittitur only with the assent of plaintiff when a jury's verdict is excessive, in which case the court may reduce the verdict to any amount warranted by the evidence. *Duracote Corp. v. Goodyear Tire Rubber Co.* (1983), 2 Ohio St.3d 160. Otherwise, a new trial must be granted. Upon due consideration of the arguments, the Court finds remittitur is neither appropriate nor warranted.

Accordingly, the Court finds the motion of Defendants for remittitur not to be well-taken and hereby OVERRULES the same.

Lastly, Plaintiffs move for an award of prejudgment interest on the back pay portion of the judgment based

upon the recent Ohio Supreme Court ruling in *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89. Defendants counter Plaintiffs are not entitled to prejudgment interest for three reasons: (1) the motion is untimely; (2) Plaintiffs are not entitled to prejudgment under existing Ohio law; and (3) prejudgment interest is not warranted under the circumstances of the case.

Neither the availability of prejudgment interest nor the calculation date of prejudgment interest in age discrimination cases is in dispute. See *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89. However, the awarding of prejudgment interest is still governed by R.C. 1343.

A party is entitled to prejudgment interest pursuant to R.C. 1343.03(C) based upon the efforts of Defendant to settle the case. R.C. 1343.03(C) states:

> Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the day the cause of action accrued to the date on which the money is paid, if upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

The Supreme Court of Ohio has determined that:

> A party has not "failed to make a good faith effort to settle" under R.C. 1343.01(C) if he has (1) fully cooperated in discovery proceedings; (2) rationally evaluated his risks and potential liability; (3) not attempted to unnecessarily delay any of the proceedings; and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

Kalain v. Smith (1986), 25 Ohio St.3d 157.

The Supreme Court held that failing to make a good faith effort does not require a finding of bad faith. *Id.* at 159. In other words, a party may fail to make a good faith effort to settle even if the party has not acted in bad faith. *Id.* The Supreme Court defined "bad faith" as:

> "'* * * a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive of fraud. It also embraces actual intent to mislead or deceive another.'" (citations omitted) *Id.* at 159.

However, the Supreme Court appears to contradict itself in a later case, concerning the bad faith finding, by stating:

> A lack of good faith means more than poor judgment or negligence; rather, it imparts a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud.

Villella v. Waikem Motors, Inc. (1989), 45 Ohio St.3d 36, 42, quoting *Ware v. Richey* (1983), 14 Ohio App.3d 3, 9.

However, more recently the Supreme Court relied solely on the *Kalain* four-prong test and failed to even refer to *Villella*. *Ziegler v. Wendel Poultry Serv., Inc.* (1993), 67 Ohio St.3d 10. Therefore, this Court agrees with the Geauga County Court of Appeals in that: "It appears that a finding of bad faith, as defined in *Villella* is unnecessary." *Detelich v. Gecik* (1993), 90 Ohio App.3d 793.

The Court has reviewed the applicable law and the particular facts and circumstances surrounding this case. Based upon this review, the Court finds this is not an appropriate case in which to order prejudgment interest. No evidence, through pleadings or oral testimony, which indicates Defendants have not made a good faith effort to settle this case.

A party does not fail to make a good faith effort to settle, pursuant to R.C. 1343.03(C), when it

1. fully cooperated in discovery proceedings;

2. rationally evaluated its risks and potential liability;

3. not attempted to unnecessarily delay any of the proceedings; and

4. made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

Kalain v. Smith (1986), 25 Ohio St.3d 157, 159.

Furthermore, a lack of good faith means more than poor judgment or negligence; rather, it imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud. *Ware v. Richey* (1983), 14 Ohio App.3d 3, 9.

In the case *sub judice*, the Court has been involved with all aspects of this case including its procedure, settlement discussions, and otherwise so as to not require a hearing on this issue. Based upon this, the Court finds the awarding of prejudgment interest in this case is not warranted. Defendants have at all times acted appropriately given the specific facts of this case. There has been no dishonest acts or conscious wrongdoing on the part of Defendants.

Lastly, both Plaintiffs have received substantial amounts in punitive damages. Where an award of punitive damages is over and above the amount adequate to compensate a plaintiff, there is no need to award prejudgment interest in order to compensate a plaintiff for the delay in payment. *Bailey v. Container Corp. of America* (S.D. Ohio 1986), 660 F. Supp. 1048.

Accordingly, the Court finds the motion of Plaintiffs for prejudgment interest not to be well-taken and hereby OVERRULES the same.

/s/
DONALD COX BY ASSIGNMENT
DAVID W. FAIS, JUDGE

Copy to:

Russell A. Kelm
Robert L. Eblin
Schwartz, Kelm, Warren & Rubenstein
41 South Third Street, Suite 2300
Columbus, Ohio 43215

Counsel for Plaintiffs

Jonn R. Gall
James D. Thomas
Squire, Sanders & Dempsey
41 South High Street, 1300
Columbus, Ohio 43215

Jacques M. Wood
Paul J. Corrado
Buchanan Ingersoll Professional Corporation
600 Grant Street, 56th floor
Pittsburgh, PA 15219-2887

Counsel for Defendants

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

Thomas J. Byrnes, et al.,	:	Case No. 91CVH06-5143
	:	
Plaintiffs,	:	JUDGE FAIS
	:	(Visiting Judge Cox)
v.	:	
	:	
LCI Communications	:	JUDGMENT ENTRY
Holdings Co., et al.,	:	[entered 10/29/93]
	:	
Defendants.	:	

* * *

Upon the verdicts of the jury rendered on October 26 and 27, 1993, it is hereby

ADJUDGED AND DECREED that Judgment be, and hereby is, rendered in favor of plaintiff Thomas J. Byrnes against defendants LCI Communications Holdings Co., LCI Communications, Inc., Litel Communications Corporation and Litel Telecommunications Corporation, now known as LCI International, Inc., in the sum of Six Million Eight Hundred Sixty One Thousand Nine Hundred Forty One Dollars ($6,861,941.00), and it is further

ADJUDGED AND DECREED that Judgment be, and hereby is, rendered in favor of plaintiff Richard C. Otto against defendants LCI Communications Holdings

Co., LCI Communications, Inc., Litel Communications Corporation and Litel Telecommunications Corporation, now known as LCI International, Inc., in the sum of Two Hundred Sixty Three Thousand Three Hundred Sixty Eight ($263,368.00), and it is further

ADJUDGED AND DECREED that interest at the legal rate shall be due on said Judgments from the date of their entry, and it is further

ADJUDGED AND DECREED that plaintiffs shall recover their attorneys' fees in an amount to be set by the Court after further hearing, and it is further

ADJUDGED AND DECREED that there is no just reason for delay in the entry of final judgment upon the verdict of the jury, and it is further

ADJUDGED AND DECREED that the matter of the valuation of the stock of plaintiffs in defendants is reserved for further decision and entry.

/s/
Donald Cox, Judge

APPROVED:

Russell A. Kelm 11034
Schwartz, Kelm, Warren & Rubenstein
41 South High Street
Columbus, Ohio 43215
(614) 222-3010
Attorneys for Plaintiffs

Jacques M. Wood
Buchanan Ingersoll, P.C.
58th Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219

and

John R. Gall 11813
Squire Sanders & Dempsey
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215

Attorneys for Defendants

(2)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1996

THOMAS J. BYRNES
AND
RICHARD C. OTTO,

Petitioners,

v.

LCI COMMUNICATIONS HOLDINGS CO.,
LCI COMMUNICATIONS, INC.,
LITEL COMMUNICATIONS CORPORATION,
LITEL TELECOMMUNICATIONS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

PATRICK F. MCCARTAN
GLEN D. NAGER
STEVEN T. CATLETT
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939

10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court has jurisdiction over a state court's application of state statutes, when no federal constitutional or statutory claim or defense is raised, merely because the state's employment discrimination law was developed in part by looking to the analogous federal *McDonnell-Douglas v. Green* model for guidance.

2. Whether the Seventh Amendment applies to state court review of state court trials.

PARTIES TO THE PROCEEDINGS

Petitioners in this case are Thomas J. Byrnes and Richard C. Otto. Petitioners have listed as Respondents four corporate entities: (1) LCI Communications Holdings Co., now known as LCI International, Inc.; (2) LCI Communications, Inc., now known as LCI International Management Services, Inc.; (3) Litel Communications Corporation, and (4) Litel Telecommunications Corporation, now known as LCI International Telecom Corp. With the exception of Litel Communications Corporation, which to the best knowledge of the remaining Respondents has never existed, the remaining corporate entities are affiliated companies and Respondents in this action. For convenience, future references to the three corporate Respondents shall be collective, using the singular "Respondent" or "LCI."

Pursuant to Supreme Court Rule 29.6, the court is advised that Respondent LCI International Inc. (formerly known as LCI Communications Holdings, Co.) is the corporate parent of the remaining Respondents, and that Respondents have no nonwholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

STATEMENT OF THE CASE

Petitioners, two former employees of Respondent LCI Communication Holdings Co. ("LCI"), filed state law claims alleging that their employment was terminated because of their ages, in violation of Ohio Rev. Code § 4112.02(N). Petitioners did not file any federal causes of action, nor invoke any federal laws. LCI did not raise any federally-based defense. After a jury verdict in Petitioners' favor was affirmed by an intermediate appellate court, the Ohio Supreme Court reversed the verdict and granted judgment in favor of LCI. (Pet. App. at A-1.)

The Ohio Supreme Court found that the evidence adduced by Petitioners was legally insufficient to support a verdict of age discrimination under Ohio Rev. Code § 4112.02(N). (Pet App. at A-7.) The plurality opinion explained (Pet. App. at A-9) that, under the Ohio Supreme Court's prior decision in *Barker v. Scovill, Inc.*, 6 Ohio St. 2d 146, 451 N.E.2d 807 (1983), discriminatory intent could be established indirectly under a four-part analysis, which *Barker* developed by looking for guidance to this Court's decision in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The plurality also noted (Pet. App. at A-8) that, under Ohio law, discriminatory intent may also be established by "direct evidence of age discrimination, which is evidence other than the four-part demonstration of *Barker*." Noting that Petitioners "concede[d] that they do not meet the four-part *Barker* analysis" (Pet. App. at A-9-10), the plurality proceeded to apply Ohio's standards for proving discrimination through "direct evidence." These standards, as the plurality explained (Pet. App. at A-9-10), were developed in two earlier Ohio Supreme Court decisions, *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, 664 N.E. 2d 1272 (1996), and *Kohmescher v. Kroger Co.*, 61 Ohio St. 3d 501, 575 N.E.2d 439 (1991). Specifically, the plurality held that, because Petitioners had shown no causal link or nexus between certain statements and their terminations, the proof was insufficient to meet the "direct

evidence" standard established in *Mauzy* and *Kohmescher*. Justices Douglas and Sweeney concurred in the judgment in a brief opinion that cited only the *Mauzy* and *Barker* cases. This petition followed.

REASONS FOR DENYING THE WRIT

Petitioners filed state claims in a state case in a state court, and they cannot now make a federal case. Because petitioners do not, and can not, establish any conceivable federal question, this Court has no jurisdiction and should not grant certiorari. In all events, even overlooking the petition's jurisdictional defect, the question that it seeks to present is simply a factbound application of well-established law. Finally, Petitioners' Seventh Amendment claim is frivolous. Under well-settled decisions of this Court, the Seventh Amendment provision that Petitioners seek to invoke does not apply in state court.

I. NO FEDERAL JURISDICTION EXISTS WHERE THE OHIO SUPREME COURT APPLIED STATE LAW TO A STATE CLAIM AND MERELY LOOKED TO ANALOGOUS FEDERAL LAW FOR GUIDANCE

Under Article III of the United States Constitution and 28 U.S.C. § 1257, this Court has "no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis*, 476 U.S. 380, 387 (1986). Here, the Ohio Supreme Court construed and applied only Ohio Rev. Code 4112.02(N), and the judgment turned on the proper application of standards developed in two Ohio cases, *Mauzy* and *Kohmescher*. Thus, this case plainly involves a question "of purely state law," *Davis*, 476 U.S. at 387, and certiorari accordingly should be denied.

Petitioners attempt to manufacture jurisdiction by citing the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 *et seq.*, and suggesting (Pet. at 5) that the Ohio Supreme Court was applying *McDonnell-Douglas*. But the simple fact is that no ADEA claim is involved here and that, at most, the

Ohio Supreme Court merely cited *McDonnell-Douglas* once, noting in passing that the earlier *Barker* decision had adopted a similar framework. (*See* Pet. App. at A-7.) Such a single, indirect citation to a broad framework such as *McDonnell-Douglas* cannot create a federal issue where none exists. *See e.g.*, *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 n. 9 (1987) ("casual reference to a federal case" in appellate brief "is insufficient to . . . present [ ] . . . a claim subject to [this Court's] appellate jurisdiction under 28 U.S.C. 1257"); R. Stern, et al., *Supreme Court Practice* § 3.22, at 143 (7th ed. 1993) ("[R]eferences in the [state court] opinion to the federal question must be more than broad generalizations or federal citations if the independence or adequacy of the state ground is to be overcome.").

Nor does this case invoke the jurisdictional principles developed in *Michigan v. Long*, 463 U.S. 1032 (1983). Since this case involves only state claims under state statutes, there simply is no issue of federal law for the state court judgment to rest upon or be intertwined with. *Long* "applies *only* when it *fairly appears* that a state court judgment rested primarily on federal law . . . ." *Coleman v. Thompson*, 501 U.S. 722, 739-740 (1991) (emphasis added).

Finally, the so-called "*McDonnell-Douglas* issue" that Petitioners seek to present is in all events no legitimate basis for certiorari. As an initial matter, the Ohio Supreme Court's decision simply did not involve application of the four-part *McDonnell-Douglas* framework, which the Ohio Supreme Court had earlier adopted in its *Barker* decision, 6 Ohio St. 3d at 147. Rather, because Petitioners "concede[d] that they d[id] not meet the four-part *Barker* analysis" (Pet. App. at A-9-10), the decision below turned on an alternative method of proving discrimination developed by the Ohio Supreme Court in its decisions in *Mauzy*, 75 Ohio St. 3d at 587-88, and *Kohmescher*, 61 Ohio St. 3d at 504-06. Thus, there cannot conceivably be any application of *McDonnell-Douglas* to review.

Nevertheless, Petitioners now purport to object (Pet. at 5) to "the Ohio Supreme Court's restrictive misconstruction of" the *McDonnell-Douglas* framework. But Petitioners do not suggest (Pet. at 6) that any modification of the firmly-established *McDonnell-Douglas* framework is necessary. This leaves Petitioners complaining (Pet. at 6) only about the application of the *McDonnell-Douglas* framework to the particular facts of this case. Such a factbound "misconstruction" or misapplication does not merit this Court's review.

II. THE SEVENTH AMENDMENT DOES NOT APPLY TO STATE COURT APPELLATE REVIEW OF STATE COURT TRIALS

It is settled law that the Seventh Amendment only governs proceedings in federal courts, and has no application to state court proceedings. *See, e.g., Gasperini v. Center for Humanities*, 518 U.S. __, __ (1996); *Curtis v. Loether*, 415 U.S. 189, 192 n. 6 (1974); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916). Accordingly, Petitioners' second question presented is frivolous and is no proper basis for certiorari.

In attempting to argue that the Seventh Amendment *does* apply in state court cases, Petitioners cite and misconstrue this Court's prior decisions. Specifically, Petitioners cite *Chicago, B. and Q. Ry. Co. v. Chicago*, 166 U.S. 226, 242-43 (1896), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n. 26 (1964), suggesting that these decisions support application of Seventh Amendment constraints to the Ohio Supreme Court's review in this case. But, in fact, these decisions do not involve application of the Seventh Amendment to appellate review by *state* courts, but instead involve application of the Seventh Amendment to *this* Court's review in cases coming from the state courts. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. at 285 n. 26. These decisions thus all are consistent with the principle that the Seventh Amendment has no application in state court.

In any event, even if the Seventh Amendment did apply, the question that Petitioners seek to present would not be worthy of certiorari. The standards of the Reexamination Clause are well-

settled, and nothing about a particular, factbound application of those standards warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK F. MCCARTAN
GLEN D. NAGER
STEVEN T. CATLETT
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939

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In The
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THOMAS J. BYRNES
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RICHARD C. OTTO

Petitioners,

v.

LCI COMMUNICATIONS HOLDINGS CO..
LCI COMMUNICATIONS, INC.
LITEL COMMUNICATIONS CORPORATION
LITEL TELECOMMUNICATIONS CORPORATION

Respondents.

Petition For Writ of Certiorari
To The Ohio Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Russell A. Kelm
Law Offices of Russell A. Kelm
37 W. Broad Street, Suite 860
Columbus, Ohio 43215
(614) 240-5900
Attorneys for Petitioners
Thomas J. Byrnes and Richard C. Otto

June 2, 1997

QUESTIONS PRESENTED

1. When a terminated employee is not replaced, should a jury verdict for the employee based on overwhelming circumstantial evidence of age discriminatory animus by the decisionmaker be overturned by an appellate court using *McDonnell Douglas v. Green,* to restrict, rather than expand, the ways to prove age discrimination?

2. Does the Seventh Amendment permit the Ohio Supreme Court to weigh the sufficiency of evidence supporting a jury verdict in order to subjectively reach an election year goal of reversing a large jury verdict against an age discriminating employer?

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I. Federal Jurisdiction Exists Where a State Court Decision Fairly Appears to Rest Primarily on Federal Law, or To Be Interwoven With Federal Law.

Respondents would minimize the impact federal law has on the Ohio Supreme Court when analyzing an age discrimination claim. They state that "at most, the Ohio Supreme Court [in *Byrnes*] merely cited *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) once, noting in passing that the earlier [decision in] *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), . . . had adopted a similar framework." Resp. Brief at 2-3. In fact, the Ohio Supreme Court's decision in this case relies upon *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St. 3d 578, 664 N.E.2d 1272, which was decided just six months before the Ohio Supreme Court's decision here (A-7 through A-8). There was no reason for the Ohio court to restate its clarification of the "methods for establishing a prima facie case of age discrimination" as so fully set forth just six months previously in *Mauzy*. Therefore, in order to fully understand the court's analysis in this case, this Court needs to consider the *Mauzy* decision.

In June 1996, the Ohio Supreme Court correctly clarified "certain aspects of the requirement for establishing a prima facie case of age discrimination." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, 664 N.E.2d 1272, 1276 (1996). The Court relied upon its previous holding in *Barker v. Scovill, Inc.*, 6 Ohio St. 3d 146, 451 N.E.2d 807 (1983), where the Court "adopted the analytic framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, [411 U.S. 792 (1973)], for use in Title VII cases . . . ."

Mauzy, 664 N.E.2d at 1276. The Court adopted as its own the *McDonnell Douglas* prima facie case and burden-shifting analysis.

Mauzy then set forth the Ohio Supreme Court's 1991 modification of the *Barker* prima facie case by indicating that the four-prong test is only necessary when direct evidence is absent. This modification was announced in *Kohmescher v. Kroger Co.*, 61 Ohio St. 3d 501, 575 N.E.2d 439, syllabus (1991). In modifying *Barker*, the *Mauzy* court quotes *Kohmescher* as follows:

> Research indicates that the *McDonnell Douglas* standards borrowed in *Barker*, *supra*, were never intended to be applied strictly. . . . Moreover, as the high court stated in *Trans World Airlines, Inc. v. Thurston*, [469 U.S. 111 (1985)], . . . ". . . the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. . . ." As the court stated in *Barnes v. GenCorp., Inc.* (C.A 6, 1990), 896 F.2d 1457, 1464: ". . . the importance of the *McDonnell Douglas* 'test' is its discussion of the elements a plaintiff must prove to establish a prima facie case of discrimination absent direct, circumstantial, or statistical evidence of discrimination." *Mauzy*, 664 N.E.2d at 1276-1277 (emphasis added), citing *Kohmescher*, 61 Ohio St. 3d at 504-506, 575 N.E.2d at 442-443.

In all, the *Mauzy* court refers to *McDonnell Douglas* 15 times in its decision on discrimination. The *Mauzy* court cites or makes reference to 35 U.S. Supreme Court, Federal Circuit Court and District Court cases, and only

two Ohio cases -- *Kohmescher* and *Barker*, both of which rely on federal case law. Clearly, the Ohio Supreme Court feels compelled to rely entirely on federal case law to hold as it does in discrimination cases.

This Court has held that when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

The interpretation of federal case law determined the results the court reached in both this case and in *Mauzy*.

This Court has exercised its jurisdiction to decide cases where the state courts relied on both state and federal law, and where the state court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Long*, 463 U.S. at 1042, citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) and *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). In *Long*, this Court reviewed the decision below under the above framework and found that an independent state ground for the decision did not exist. *Long*, 463 U.S. at 1043.

Here, the Ohio Supreme Court relies exclusively on its understanding of federal case law in the area of age discrimination. It set forth that analysis of the federal case law in *Mauzy* and adopted the same analysis in its ruling in this case six months later. The Ohio Supreme Court was compelled to rule as it did based upon its interpretation of federal law. The Ohio courts use *McDonnell Douglas* as the foundation and federal case law as the building blocks in its interpretation of discrimination cases. Thus, federal jurisdiction exists to review this decision.

II. The Reexamination Clause of the Seventh Amendment Applies to a State Supreme Court Reversal of an Age Discrimination Jury Verdict Based on Its Misinterpretation of Federal Decisional Law.

When the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, was adopted by Congress in 1967 to prohibit employment discrimination against

older Americans, there were no similar prohibitions in most of the states. Ohio adopted similar prohibitions more than 10 years later and, by 1987, made them generally enforceable through civil lawsuits heard before juries. *See* Ohio Revised Code Sections 4112.14, 4112.02(A) and (N) and 4112.99. With a head start of decades of federal decisional law in interpreting what constitutes discrimination and how it is proven, Ohio courts look expressly to federal court interpretations of similar laws for guidance. *Barker v. Scovill, Inc.*, 6 Ohio St. 3d 146, 147, 451 N.E. 2d 807, 808 (1983).

Ohio has a state court system that processes lawsuits in about half the time consumed in federal court, without the need to first pursue administrative proceedings with the EEOC. Most discrimination cases are now filed in Ohio in the state courts. The misconstruction of federal discrimination precedents by the Ohio Supreme Court in this case threatens to change the reliance on the state court system which in this case twists the expansive federal precedents on proving discrimination into (1) a bar on using circumstantial evidence in many cases, and (2) the insertion of an artificial causation requirement into proof at trial.

The Seventh Amendment has two clauses, only one of which is relevant here. Its trial by jury clause, which guarantees jury trials in civil cases, is generally restricted to federal law issues. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (no right to jury trial on state law issues in state courts); *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211, 219-220 (1916) (state procedure of using 5/6 verdict for deadlocked juries did not violate Seventh Amendment); *Curtis v. Loether*, 415 U.S. 189, 192

(1974) (Seventh Amendment creates substantive right to jury trial of federal fair housing claim but does not require jury trial of all state law claims).

The reexamination clause of the Seventh Amendment however prohibits appellate courts from reviewing the evidence determined by the jury, exactly what the Ohio Supreme Court did here. If the clause applies, the appellate court reversal of the jury verdict may not stand. The reexamination clause cases revolve around different issues as to whether the review is of the liability or damages portion of a verdict. While the trial judge could grant a remittitur of a verdict, *Railroad Co. v. Fraloff*, 100 U.S. 24, 31-32 (1879), an appellate court could not review that determination, until recently, *Gasperini v. Center for Humanities, Inc.*, 116 Sup. Ct. 2211, 2217-19 (1996) (can the review trial judge's "deviates materially review" but only for abuse of discretion). Even the review permitted in *Gasperini* is drastically limited, and trial judges may not increase the verdict as an alternative to granting a new trial. *Dimick v. Schiedt*, 293 U.S. 474 (1935).

The other aspect of the reexamination clause is the review of jury liability determinations. For more than 150 years federal appellate courts deciding federal issues have been prohibited from reexamining facts presented to a jury. The trial court could either grant or deny a new trial, but that decision could not be reviewed on appeal, which was boldly done by the Ohio Supreme Court here. *See*, *United States v. Laub*, 37 U.S. 1 (1838); *Insurance Co. v. Folsom*, 85 U.S. 237 (1873); *Railroad Co. v. Fraloff*, 100 U.S. 24, 31 (1879); *Ayers v. Watson*, 137 U.S. 584, 597 (1890); *Luckenbach S.S. Co.*

v. United States, 272 U.S. 533, 540 (1926). Learned Hand called this rule too well established to justify discussion. *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). In its review of the factual basis of the verdict here, the Ohio Supreme Court canvassed and construed the federal case law basis (mostly from decisions of this Court) for its justification in reexamining in detail the evidence presented to the jury including most of the 12 discriminatory statements by the decision-maker over a five-year period of time. *See* Petition at 8-10.

When a state appellate court rests its decision upon federal law, this Court has jurisdiction to review the decision. *Quinn v. Millsap*, 491 U.S. 95, 102 (1989) (state court decided federal questions before it); *Indiana ex rel. Anderson v. Beard*, 303 U.S. 95, 98 (1938) (state court decided case adversely to the federal right asserted). That the state court might have, but did not use, state law to decide the issue, does not foreclose review. *Zacchini v. Scripps-Howard Broadcast Co.*, 433 U.S. 562, 568 n.6 (1977) (Ohio court could have decided under state law but did not; so, Supreme Court had jurisdiction over the appeal). The Seventh Amendment applies to cases of federal cognizance coming from a state court. *Justices v. Murray*, 76 U.S. 278 (1870); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964). In *Sullivan*, this Court applied the Seventh Amendment reexamination clause to state court cases being reviewed as follows:

> The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact

> tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. . . . But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "This Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26 (citations omitted).

Even if the decision of the state appellate court ultimately rests on Ohio law, if the state court "felt compelled by what it understood to be federal . . . considerations to construe and apply its own law in the manner it did," this Court has "jurisdiction and should decide the federal issue." *Zacchini*, 433 U.S. at 568 (Ohio courts).

As pointed out in the extensive dissenting opinion in the Ohio Supreme Court here (Petition at A-12 to A-40), the lead opinion by the court ignores and recasts the evidence which may be used at trial in discrimination cases as set forth in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 578-579 (1978) (any kind of evidence can be used to show discrimination at trial); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-716 (1983) (discrimination should be treated no differently than any other ultimate issue of fact) ("*McDonnell Douglas* was never intended to be rigid,

mechanized, or retrialistic"); and *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989) (employee can use a variety of types of evidence to show pretext and may not be limited to evidence of a certain type). These well-established principles and cases are fundamentally at odds with the Ohio Supreme Court's decision here limiting the use of circumstantial evidence to prove discrimination to only when all the elements of *McDonnell Douglas* are satisfied.

Finally, the Ohio Supreme Court in this case imposed a causation layer into the formula for proving discrimination which is impossible to satisfy (Petition at A-10 - A-11). A similar causation link was imposed by an Ohio appellate court in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 114-115 (1963), in which this Court reversed the state court's application of federal law in a state proceeding. The issues of causation are best left to determination by the jury. *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 32-33 (1944). Inferences and conclusions are best left to the jury since they are the fact finding body.

> The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgtown R. Co. v. McDade* 135 U.S. 554, 571, 572 (1890); . . .. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Gallick*, 372 U.S. at 115.

The Seventh Amendment insures that appellate judges are not to reweigh evidence and set aside a verdict

because the jury drew different inferences or conclusions or because other results seem more reasonable. *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944).

The reversal of this unanimous jury verdict in a case which was "well and truly tried, the parties skillfully represented and the operative law correctly stated to the jury by the trial judge" (Dissent of Justice Pfeiffer, Petition at A-40), was simply wrong and was politically inspired decision-making which compels the return of the correct legal standards to Ohio and the reinstatement of the verdict.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Russell A. Kelm
Law Offices of Russell A.. Kelm
37 W. Broad Street, Ste. 860
Columbus, Ohio 43215
(614) 240-5900
Attorneys for Petitioners
Thomas J. Byrnes and Richard C. Otto

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